TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 106 137.

F. WINDSOR ROBINSON, AS RECEIVER OF THE CONCERNS OF THE STATE NATIONAL BANK OF VERNON, TEXAS, PLAINTIFF IN ERROR,

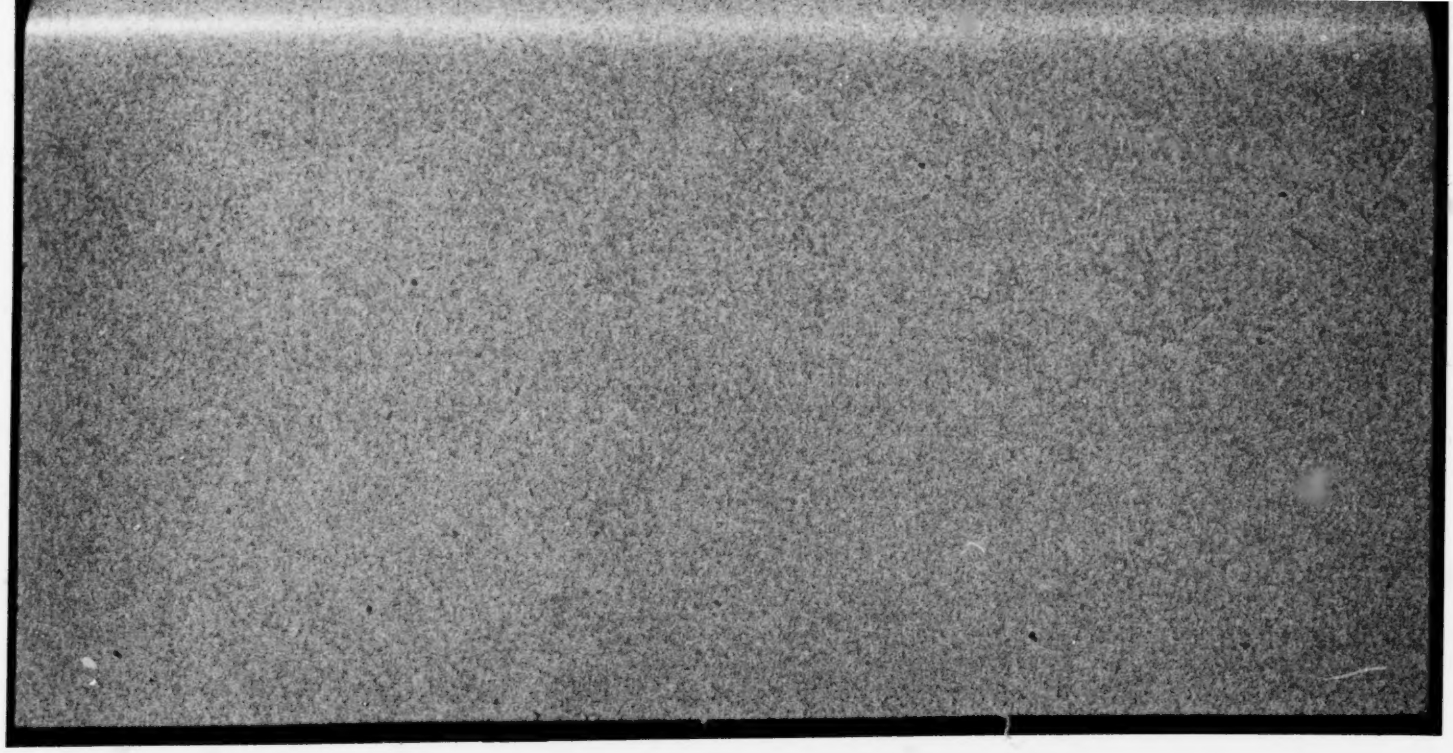
vs.

THE SOUTHERN NATIONAL BANK OF NEW YORK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED SEPTEMBER 28, 1899.

(17,520.)



(17,520.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 406.

F. WINDSOR ROBINSON, AS RECEIVER OF THE CONCERNS OF THE STATE NATIONAL BANK OF VERNON, TEXAS, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN NATIONAL BANK OF NEW YORK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA, Second Judicial Circuit, } ss.:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Southern District of New York, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between F. Windsor Robinson, as Receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff, and the Southern National Bank of New York, defendant, a manifest error hath happened to the great damage of the said F. Windsor Robinson, as Receiver, etc., plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same in New York City, in said Circuit Court, on the 27th day of February next, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done

therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of January, 1899, and in the one hundred and twenty-second year of the Independence of the United States of America.

JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed, and the same being taken by order of the Comptroller of the Currency of the United States, it is ordered that said appeal shall operate as a supersedeas without bond.

Dated, N. Y., 31st January, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON

against

THE SOUTHERN NATIONAL BANK OF NEW YORK.

I direct that a writ of error from the Circuit Court of Appeals for the Second Circuit be sued out in this case.

CHARLES G. DAWES,
Comptroller of the Currency.

Office Comptroller of the Currency,
Washington, D. C., January 25, 1899.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the City of New York, this 9th day of September, in the year one thousand eight hundred and ninety-seven.

[L.S.]

JOHN A. SHIELDS,
Clerk.

EDWARD WINSLOW PAIGE,
Plaintiff's Attorney.
Office and Post Office Address,
44 Cedar Street,
New York City.

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Wednesday, the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable E. HENRY LACOMBE,
Circuit Judge.

F. WINDSOR ROBINSON, Receiver, &c.,

vs.

SOUTHERN NATIONAL BANK.

Now comes the plaintiff by Edward Winslow Paige, Esq., his attorney.

Likewise comes the defendant by William B. Hornblower, Esq., its attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence for the plaintiff the jury by direction of the Court say they find a verdict for the defendant, and so they say all.

Thereupon the Court grants a stay of sixty days to the plaintiff in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An Extract from the Minutes.

[L. S.] JOHN A. SHIELDS,
Clerk.

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

Plaintiff

against

THE SOUTHERN NATIONAL BANK,

Defendant.

Plaintiff shows to the Court, on information and belief:—

I.—That the State National Bank of Vernon, Texas, was and, except as hereinafter stated, is a national banking association organized under the laws of the United States.

II.—That on the eighteenth of August, 1894, the said banking association was insolvent and closed its doors, and the Comptroller of the Currency, after due examination, became satisfied of its insolvency, and upon the twenty-fourth day of September, 1894, appointed the plaintiff Receiver. That the plaintiff accepted such appointment, entered upon the duties of his trust and has since been engaged in their performance, and for the purpose of winding up the affairs of such banking association he now brings this action by the direction of the Comptroller of the Currency.

That the assets of such association are not, and

have not at any time since the eighteenth of August, 1894, been sufficient to pay its liabilities within the sum of fifty thousand dollars. That the capital of said banking association was fifty thousand dollars.

III.—That prior to the first day of February, 1895, the Comptroller of the Currency became satisfied, after due examination, of the fact that the assets would not pay the liabilities within fifty thousand dollars, and thereupon determined to make and did make an assessment upon the capital stock of said banking association and the owners of the same, equal to the par value of such stock, viz: the sum of fifty thousand dollars.

IV.—That the defendant is a national banking association organized and existing under the laws of the United States and located in the City of New York, and has been so since and before the twentieth of January, 1893.

That on the twentieth of January, 1893, one W. G. Curtis was the owner of one hundred and eighty shares of the capital stock of the said State National Bank, of the par value of one hundred dollars each, which stood in his name on the books of the bank and for which he held the usual certificates. That on that day one A. U. Thomas and the said Curtis made their promissory note in the words and figures as follows:

"$15,000. New York, Jany. 20, 1893.

"Four months after date, for value received, "we promise to pay to the order of 'The Southern "National Bank of New York' at said Bank in "the City of New York, in funds current at the "New York Clearing House fifteen thousand dol- "lars, having deposited with said Bank as col- "lateral security for payment of this or any other

" liability or liabilities of ours to said Bank, now " due or to become due, or that may be hereafter " contracted, the following property, viz: One " hundred and Eighty (180 shares of the Capital " stock of The State National Bank of Vernon, as " evindenced by Cts. No. 97 150 Shs., Ctf. No. 98 " 30 Shs. the market value of which is now " $18,000, with the right on the part of said " Southern National Bank of New York, from " time to time, to demand such additional security " as said Bank may deem sufficient should the " market value thereof decline, and upon our " failure to comply with any such demand, this " obligation shall forthwith become due, with full " power and authority to said Bank or assigns, in " case of such default or of the non-payment of " any of the liabilities above mentioned at ma- " turity, to sell, assign and deliver the whole, or " any part of such securities, or any substitutes " therefor or addition thereto, at any broker's " board, or at public or private sale, at the option " of said Bank, at any time or times thereafter, " without advertisement or notice to us *and with* " *the right on the part of said Bank to become* " *purchasers thereof*, at said sale or sales, freed " and discharged from any equity or redemption. " And after deducting all legal or other costs and " expenses for collection, sale and delivery, to " apply the residue of the proceeds of such sale or " sales so made, to pay any, either or all of said " liabilities, as said Southern National Bank, of " New York, shall deem proper, returning the " overplus to the undersigned; and we will still " remain liable for any amount so unpaid.

" W. G. CURTIS,
" A. U. THOMAS,"

and, for valuable consideration, delivered the same to the defendant, and also then delivered to the

defendant as collateral security as above the said certificates for the said stock, endorsed in blank by the said Curtis and with the power of attorney on the back of each executed in blank by the said Curtis.

That the said note was not paid when due and is still wholly unpaid, except as hereinafter stated.

That on the *first day of August, 1893*, the said defendant *advertised the said stock* to be sold on the eighth day of August, 1893, at noon, by Richard V. Harnett and Company, Auctioneers, at the public exchange where such sales in New York are usually made, and on the first day of August, 1893, it gave to the said Thomas and Curtis notice in writing by telegraph that said sale would be made on the eighth of August as aforesaid. That at the time and place where said sale was advertised to be made as aforesaid, and of which notice had been given to the said Curtis and Thomas as aforesaid, the said sale was made by the said auctioneers and the stock was sold at public auction to the defendant for the sum of twenty dollars, that being the highest sum bidden for the same and the defendant being the highest bidder. That the defendant paid the said sum of twenty dollars to the said auctioneers and received from them the sum of twelve dollars, being the said purchase price less the auctioneers' fee of eight dollars, and thereupon the defendant credited upon said note by an endorsement in writing thereon the said proceeds of said sale and immediately brought suit in the District Court of Wilbarger County, Texas, against both the said Curtis and the said Thomas for the balance due upon the said note after crediting the proceeds of the sale of the stock as aforesaid.

That the said certificates for such stock remained in the possession of the defendant from the time of

the said sale until after the making of the assessment by the Comptroller of the Currency, as aforesaid, but the same have not been transferred upon the books of the bank in Texas.

V. That on the twenty-first of July, 1893, the State National Bank of Texas had suspended and was in possession of the United States bank examiner from that date until the fourteenth of September, 1893, when it reopened for business and continued to transact business as usual until the eighteenth of August, 1894, when it finally closed as aforesaid, and that the fact of such suspension and that the bank examiner was in charge was known to the defendant on the twenty-sixth of July, 1893.

VI.—That at February term of 1894, the said Curtis and Thomas reconvened in the said suit in Texas and alleged the invalidity of the aforesaid sale of the stock and prayed for damages because of the same, and such proceedings were afterwards had in such suit that the trial court, being the said District Court of Texas, having full jurisdiction, and there being parties to the said suit the said Curtis and Thomas and the defendant, found as a fact after the trial of said action, as follows: "On "the 8th day of August, 1893, plaintiff caused said "shares of stock to be sold at public auction in "New York City, when plaintiff became the pur- "chaser at $20, paid the auctioneer $8 costs of sale, "and credited defendants' note with $12, and on "the 10th day of August, 1893, brought this suit "to recover of the said Curtis and Thomas the "balance due on said $15,000 note."

On appeal from judgment entered upon the decision containing the above findings, the Civil Court of Appeals of Texas held as follows: "In accor- "dance with the terms of the contract pledging

"this stock, appellant" (the defendant in this action) "caused the same to be publicly sold on "the stock market in New York, and became the "purchaser thereof for $20, just prior to the bring-"ing of the suit," and by its judgment the said Civil Court of Appeals affirmed the finding of the District Court above quoted.

Wherefore plaintiff demands judgment against the defendant for Eighteen thousand dollars, with interest from the time of the making of the assessment by the Comptroller of the Currency, and costs.

EDWARD WINSLOW PAIGE,
Attorney for the Plaintiff,
44 Cedar Street,
New York.

NORTHERN DISTRICT OF NEW YORK, Schenectady County, } ss:

EDWARD WINSLOW PAIGE, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is not made by the plaintiff is because the plaintiff is not a resident of the State of New York, but is a resident of the State of Texas and is now out of the State of New York and the jurisdiction of the Court.

EDWARD WINSLOW PAIGE.

Sworn to before me this eighth day of September, 1897.

EDWARD D. PALMER,
[SEAL.] Notary Public.

(Endorsed): "U. S. Circuit Court, So. Dist. of N. Y., F. Winslow Robinson, as Receiver, etc., Plaintiff.—against The Southern National Bank, Defendant.—Copy Complaint. Edward Winslow Paige, Attorney for Plaintiff, 44 Cedar Street, New York City."

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver, etc.,
Plaintiff,

vs.

THE SOUTHERN NATIONAL BANK,
Defendant.

} Answer.

The defendant answering the complaint alleges:

I.—Referring to the allegations in the paragraph of the complaint numbered IV., this defendant denies the statement as to the partial payment of the note as therein contained. This defendant denies the allegations of paragraph IV. of the complaint as to the alleged sale to the defendant of the stock of the State National Bank of Vernon, Texas, therein mentioned, except as hereinafter admitted. This defendant admits that the certificates of stock mentioned in the complaint were as matter of form struck off to this defendant at public auction, this defendant having bidden therefor twenty dollars ($20), and having nominally purchased said certificates. The defendant furthermore alleges in regard to the facts there set forth that the stock was never transferred on the books of the State National Bank of Vernon, Texas, and that Thomas and Curtis insisted from the time when such stock was struck off at auction, that there had been no valid sale or transfer of title thereof, and defendant avers that it made such purchase of said stock solely for its own protection as pledgee and it never claimed unqualified title to said stock, but expressly disclaimed such title, and at all times thereafter held the stock subject to redemption by Thomas and

Curtis and subject to their order upon payment of the amount of their note with interest, and so notified said Thomas and Curtis, and defendant tendered said stock in the suit in Texas referred to in paragraph numbered VI. of the complaint herein. The final judgment in such suit, as rendered by the Court of Civil Appeals of Texas, adjudged to this defendant the full face of the note with interest, and adjudged the title to the bank stock to be in Thomas and Curtis, and decreed the stock to them as tendered.

II.—Referring to the allegations contained in the paragraph of the complaint numbered VI., the defendant denies that the facts there stated were found by the Civil Court of Appeals of Texas, but on the contrary, defendant avers that what was found and adjudicated by said Court was that Thomas and Curtis were indebted to the defendant in the full amount of the note set forth in the complaint, and by the final judgment of the said Court of Appeals in the said suit of Southern National Bank of New York against Curtis and others, it was found, adjudicated and decreed as follows:

> "We therefore adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant [that is, the present defendant in this action] against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered."

Wherefore defendant demands judgment that the complaint be dismissed.

HORNBLOWER, BYRNE, TAYLOR & MILLER,
Attorneys for Defendant,
Office and Post Office Address,
30 Broad Street, New York City.

City and County of New York, ss.:

WALTER S. JOHNSTON, being duly sworn, says that he is an officer of the defendant herein; that he has read the foregoing answer, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The reason why this verification is made by deponent and not by the defendant is that the defendant is a corporation; that the sources of deponent's knowledge and the grounds of his belief as to the matters not stated as of his own knowledge are various papers relating to the matters in controversy.

WALTER S. JOHNSTON.

Sworn to before me, this 1st day of December, 1897.

CLIFFORD E. DUNN,
Notary Public,
Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

(Endorsed): "U. S. Circuit Court, Southern District of New York.—F. Windsor Robinson as Receiver, etc., *vs.* The Southern National Bank.—Answer—Hornblower, Byrne, Taylor & Miller. Attys. for Deft., 30 Broad St., N. Y."

IN THE UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

SOUTHERN NATIONAL BANK.

COSTS OF THE DEFENDANT, SOUTHERN NATIONAL BANK.

Docket fee.....	$20.00
Clerk's fees on entering Judgment.	4.50
Marshal's fees on execution.....	1.45
	$25.95

Taxed at the sum of Twenty-five 95/100 dollars this 16th day of December, 1898.

JOHN A. SHIELDS,
Clerk.

I hereby consent that costs in the above-entitled action be adjusted at Twenty-five and 95/100 dollars in accordance with the above, waive notice of taxation, and consent that judgment be entered herein for the above amount.

EDWARD WINSLOW PAIGE,
Attorney for Plaintiff.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

SOUTHERN NATIONAL BANK.

The summons in this action having been personally served on the defendant, Southern National Bank, and the defendant having duly appeared by Hornblower, Byrne, Taylor & Miller and answered, and the issues in this action having come on for trial on the 26th day of October, 1898, before Hon. E. Henry Lacombe, Circuit Judge, and a jury having been duly impaneled and sworn, and the plaintiff having appeared by counsel, and the defendant having appeared by counsel, and verdict having been rendered in favor of the defendant by the direction of the Court on that day, and the defendant's costs having been taxed at twenty-five and $\frac{95}{100}$ dollars, now on motion of Hornblower, Byrne, Taylor & Miller, attorneys for the defendant, Southern National Bank, it is

Adjudged, that the defendant, Southern National Bank, have judgment upon the issues herein against the plaintiff, F. Windsor Robinson, as Receiver of the concerns of the State National Bank of Vernon, Texas.

And further adjudged, that the defendant,

Southern National Bank, do recover of the plaintiff, F. Windsor Robinson, as Receiver, the sum of twenty-five and $\frac{95}{100}$ dollars, its costs and disbursements.

Judgment signed this 16th day of December, one thousand eight hundred and ninety-eight.

JOHN A. SHIELDS,
Clerk.

[Endorsed]: "Filed Dec. 16, 1898."

(Endorsed): "Circuit Court, Southern Dist., N.Y. —F. Windsor Robinson as Receiver, etc., against Southern National Bank.—Copy, Judgment.—Hornblower, Byrne, Taylor & Miller, Attorneys for Defendant, 30 Broad Street, New York, U. S. Circuit Court. Filed Dec. 16, 1898, 4.30 P. M. John A. Shields, Clerk."

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

Be it remembered that on the twenty-sixth day of October, 1898, before the Circuit Court of the United States for the Southern District of New York, held by Judge Lacombe, the issues in this case were tried to a jury in the presence of Edward Winslow Paige for the plaintiff and William B. Hornblower and Howard A. Taylor for the defendant, and the plaintiff having opened his case, read in evidence a stipulation and the facts therein stated as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver, &c.,

against

THE SOUTHERN NATIONAL BANK.

Stipulation.

It is hereby stipulated and agreed on behalf of the parties hereto as follows:

On the 1st day of August, 1893, the defendant

notified Curtis and Thomas by telegraph that the stock would be sold on the eighth day of August, 1893.

On the 7th day of August, 1893, it advertised in the New York papers, where such things are usually advertised, that the stock would be sold at noon on the 8th day of August, 1893. On the 8th day of August, 1893, at noon, at the Public Exchange in New York, the stock was by direction of the defendant put up for sale by Richard V. Harnett, Auctioneer, at public auction, and was struck off to the defendant for the sum of twenty dollars, the defendant being the highest bidder, and that being the highest sum bid for it. That the defendant then paid to Richard V. Harnett the twenty dollars, and afterwards received back from him that sum, less his fees.

That was the place where, and the way in which sales of collateral to such notes were then made in New York.

The foregoing facts are admitted, however, without prejudice to the right of either party upon the trial to introduce oral proof as to the terms and circumstances of the sale, and without prejudice to defendant's claims as to the legal effect of the said purchase and sale.

It is further stipulated and agreed, that either party may read in evidence, subject to objections to materiality, copies of letters or telegrams from or on behalf of the Southern National Bank, with like effect as if the originals were produced.

The foregoing stipulation shall apply only to the first trial of this action, and shall not be binding on either of the parties hereto in case of any second or further trial hereof, should any such trial hereafter take place by reason of reversal of

the judgment hereafter obtained herein or otherwise.

Dated New York, May 13, 1898.

Attorneys for Plaintiff.
HORNBLOWER, BYRNE, TAYLOR & MILLER,
Attorneys for Defendant.

and then read in evidence the following telegram:

"NEW YORK, July 31, 1893.

"H. C. THOMPSON,

"Vernon, Texas,

"DEAR SIR:

"We telegraphed you this day as follows: "Stock will bring only nominal price but this will "fix amount balance to sue for. It will be con- "trolled by us; Wire yes or no, as to our proposi- "tion about fee. If no we must engage some other "lawyer.

"W. W. FANNING,
"President."

The plaintiff then read in evidence an exemplified copy of pleadings and decision of the County Court of Wilbarger County, Texas, as follows:

STATE OF TEXAS,

COUNTY OF WILBARGER.

THE SOUTHERN NAT'L BANK OF NEW YORK, *vs.* No. 688. W. G. CURTIS & A. U. THOMAS.	In the District Court of Wilbarger County, Texas, To Feby. Term, 1894.

To the Hon. G. A. BROWN, *Judge of said Court:*

Your petitioner, The Southern National Bank of New York, hereinafter styled plaintiff, complain-

ing of W. G. Curtis and A. U. Thomas hereinafter styled defendants, would most respectfully show to the Court that plaintiff is a resident corporation of the City and State of New York and domiciled therein, and duly and legally incorporated under and by virtue of the laws of the United States of America and that the defendants are each resident citizens of the County of Wilbarger in the State of Texas.

That on heretofore, to wit: on Jany. 20th, 1893, the defendants made and executed their certain promissory note in writing bearing date on the day and year last aforesaid for the sum of fifteen thousand dollars payable to the order of plaintiff herein four months after date for value received, that no rate of interest was specified in said note but that the same bears interest at the rate of six per cent. per annum from maturity, a copy of which said note is hereto attached and made a part hereof and marked "Exhibit A."

That said note was duly delivered to the plaintiff by the defendants for a valuable consideration, who are now the legal and equitable owners and holders thereof. That at the date and delivery of said note to the plaintiff, the defendants also delivered and pledged as collateral security to secure the payment of said note one hundred and eighty shares of the capital stock of the State National Bank of Vernon, as evidenced by Crft. No. 97 for 150 shares, and Crft. No. 98, 30 shares. That by the terms of said note the plaintiff was authorized and empowered on default of the payment thereof to sell said capital stock of the State National Bank of Vernon, at any broker's board in New York City, or at public or private sale at the option of plaintiff Bank at any time or times after maturity thereof without advertisement or notice to the defendants, and with the right on the part of the

said Bank, to become purchasers thereof at said sale or sales freed and dischared from any equity of redemption, that the net proceeds of the sale of said stock were to be credited on said note.

That at the maturity of said note the defendants failed and refused to pay the same or any part thereof, although payment has been demanded of them at said plaintiff Bank oftentimes.

That on the 8th day of August, 1893, said above-mentioned collateral security was duly and properly sold according to the terms of the note herein sued on in the City of New York and the net proceeds thereof, amounting to twenty dollars, applied as a credit on said note.

That the balance, to wit, the sum of fourteen thousand nine hundred and eighty dollars still remains due and unpaid, besides interest, which the defendants have wholly neglected and refused to pay, although often demanded of them, to plaintiff's damages in the sum of twenty thousand dollars. That according to the terms of said note they became liable and promised to pay the same.

Wherefore, premises considered, plaintiff prays that defendants be cited to answer this petition that it have judgment against said defendants for the amount due on said note for its damages, interest, costs of suit and general relief.

H. C. THOMSON,
Atty. for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK	
vs.	Suit pending in the District Court of Wilbarger County, Texas. Feby. Term, 1895.
W. G. CURTIS, A. U. THOMAS and H. C. THOMSON.	

Now comes the plaintiff, the Southern National

Bank of New York, and in vacation files this its first amended original petition herein, intending thereby to amend its original petition filed herein August 10th, 1893, and for said amendment plaintiff says:

That it is a National Bank duly incorporated under the laws of the United States of America, doing business in the City and State of New York. That at the institution of its suit firm defendants A. U. Thomas and W. G. Curtis each resided in Wilbarger County, Texas, and that said defendants have been duly cited herein and are now before the court in this cause. That defendant H. C. Thomson is a resident of Wilbarger County, Texas, and is also made defendant hereto by plaintiff.

That heretofore, to wit, on 20th January, 1893, the said defendants W. G. Curtis and A. U. Thomas, for value received made, executed and delivered to plaintiff their certain promissory note in writing, bearing date on the day and year last aforesaid, whereby they promised plaintiff to pay it or its order four months after date the sum of $15,000. That no rate of interest is specified in said note, but under the laws of the State of Texas same bears interest at 6 per cent. per annum from its date. A copy of said note is attached hereto as part hereof marked Exhibit A. That said note is long since due, and, though its payment has often been demanded of the said defendants, they have refused and still refuse to pay same or any part thereof to plaintiff's damage $20,000.

That prior to filing this suit the plaintiff placed said note in the hands of the defendant H. C. Thomson for collection and remittance to them, and after filing suit in this cause and after the defendants A. U. Thomas and W. G. Curtis—— the Court herein, and the Court had fully—— said sum herein and of the said note, the said H. C.

Thomson did unlawfully and fraudulently and without the consent of plaintiff converted said note to his own use, and is now claiming ownership and title thereto; said note is of the value and worth $20,000. And though possession has often been demanded of him by plaintiff, he refuses to deliver same to plaintiff, to its damage $20,000.

The defendants are notified to produce said note at the trial hereof, or secondary evidence of its contents will be then offered by plaintiff. Wherefore, plaintiff asks that citation issue herein to said H. C. Thomson, commanding him to appear and answer herein at the next term of this Court for judgment against him for the possession of said note, and that he be required to produce same at the trial hereof and deliver same into Court here, and in the event he fails to do this, that a judgment against him for its value and for judgment against said A. U. Thomas and W. G. Curtis for the said sum of $15,000, with interest, and for judgment against said A. U. Thomas, W. G. Curtis and H. C. Thomson for costs and general and special relief, etc., etc.

R. P. ELLIOTT,
Attorney for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK *vs.* No. 688. A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas.

Now comes the Southern National Bank of New York, and leave of the Court being first had, files this its first supplemental petition, and for such petition says:

Plaintiff excepts to each and every ground of defense or cross action, except the general denial, in defendants' first amended original answer con-

tained, and says that the same are each and all wholly insufficient in law to require further answer thereto, and of this plaintiff prays judgment of the Court.

H. C. THOMSON,
Attorney for Plaintiff.

1st.—Plaintiff specially excepts to defendants' said answer herein wherein it charges damages, by reason of the sale of said stock during a financial depression, because said answer shows upon its face that plaintiff had the right to sell said stock and any time after default in payment of the note.

2nd.—Plaintiff further specially excepts to defendants' answer wherein it seeks to have the stock pledged by defendants foreclosed upon and sold by this Court, because this would be varying the terms of the contract or pledge, as shown by defendants' answer.

Wherefore, plaintiff prays judgment of the Court.

H. C. THOMSON,
Attorney for Plaintiff.

Further answering herein, plaintiff denies all and singular the allegations in defendants' original answer contained, and of this it puts itself upon the country. Wherefore plaintiff prays judgment.

H. C. THOMSON,
Attorney for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK
vs.
A. U. THOMAS *et al.*

In District Court of Wilbarger County, Texas. Feby. Term, 1895.

PLAINTIFF'S 2ND SUPPLEMENTAL PETITION.

Now comes the plaintiff the Southern National Bank of New York, and by leave of the Court files

this its 2nd Supplemental Petition herein and for said supplemental petition plaintiff says:

1st. It excepts to the 2nd amended answer of defendants Thomas & Curtis and the plea of reconvention of the defendant Thomson herein because it says that said answer nor said plea of reconvention neither states facts sufficient to constitute a defense or cause of action herein against plaintiff.

2nd. Specially excepting to said answer of said defendants Thomas & Curtis, plaintiff says the allegations there as to sale of the bank stock by it are insufficient and states no facts to show that said Curtis & Thomas have been damaged by reason of said sale.

3rd. Because the allegations there as to the sale of said stock by plaintiff in depressed terms states no cause of action against plaintiff and is insufficient to have any damages upon. Because the said answer fails to allege the value of the bank stock in the City of New York, the authorized place for the sale of same under the pledge of same as collateral security.

4th. Because defendant's plea of accord and satisfaction shows no definite agreement consideration therefor paid to plaintiff by defendant or that same was ever executed or accepted.

5th. Specially excepting to the plea of reconvention by the defendant Thompson, plaintiff says—1st, that the matters alleged therein are in no way connected with, resultant from or (?) to the main action upon which this suit is instituted by plaintiff herein.

6th. (2), Because the amended petition of plaintiff herein by which H. C. Thomson is made a defendant to this cause the facts alleged against him

in said petition are in the nature of an action *ex delicto* or for unliquidated or uncertain damages founded upon a tort, whereas said defendant's plea of reconvention is for an action arising upon an alleged debt due him by plaintiff upon an alleged contract both expressed and implied, and which said defendant so pleaded in reconvention is not founded upon any cause of action arising out of, incident to or consistent with plaintiff's said cause of action against the said H. C. Thomson and the said alleged indebtedness of the said H. C. Thomson arises from a separate and distinct cause of action.

7th. (3), Because the count of the said H. C. Thomson to his plea of reconvention herein in which he undertakes to plead an implied premium and *quantum meruit* against plaintiff, fails to allege that plaintiff ever promised to pay the said H. C. Thomson any sum for his services therein. Wherefore plaintiff prays judgment of the Court.

ELLIOTT & LUCKY,
Attorneys for Plaintiff.

8th. And answering herein, plaintiff denies all and singular the allegations to said amended answer of the said Thomas & Curtis. And the said 1st amended answer and plea of reconvention of the said H. C. Thomson, contained and of this it puts itself upon the country.

9th. Specially answering herein further, plaintiff says that they deny that they employed the said H. C. Thomson as attorney to represent them herein to sue alone on the said notes of said Thomas & Curtis and to foreclose their lien upon the bank stock mentioned heretofore herein, and that they agreed to pay him the sum of $100 cash as a return and 10 per cent. of the amount he might secure herein against said Thomas & Curtis; but the

plaintiff alleges the facts to be, to wit: That it employed the said H. C. Thomson to bring the suit against the said Thomas & Curtis, upon the note sued upon herein by it and to litigate said cause to a final judgment, against the said Thomas & Curtis, and to pay him for all such services the sum of $100 as a retainer in cash, which it has done, and the further sum of 10 per cent. on the amount he might be able to collect out of the said Thomas & Curtis, upon the said note. And that at the time of the said employment of the said Thomson it was contemplated, agreed and understood by and between the plaintiff and said Thomson, that the said compensation so agreed upon as aforesaid was to fully recompense the said Thomson for any and all services he might render plaintiff to said cause, to its completion and final consummation. And that after said Thomson had brought this suit under the contract above stated, that he drew upon and demanded the payment of by plaintiff of various large sums of money claimed by him to be due him in services herein which plaintiff had not agreed to pay him, and did not and refused to pay him, by reason of which said refusal by plaintiff to pay him said sums of money so demanded as aforesaid, the said Thomson refused to further prosecute said cause herein as attorney for plaintiff, and voluntarily withdrew and abandoned said cause, thereby enforcing and compelling plaintiff to employ other and additional counsel to represent it in said cause, and plaintiff has fully paid said Thomson all amounts due him as its attorney herein under said contract or otherwise, and plaintiff avers that the said Thomson handled and managed this cause for it in a skillful and prudent manner, and as a skillful and prudent attorney would manage suits of a similar character; but that upon the other hand plaintiff alleges that

the management of said suit by the said Thomson, as attorney for plaintiff, was of an unskillful, careless and grossly negligent manner, and that his management of said cause resulted in great complications, impediments, injuries and damages to plaintiff.

Wherefore, plaintiff says the said Thomson is not entitled to any judgment against it by reason of his plea of reconvention herein, and it prays judgment dismissing him, for its costs, and general and special relief, etc.

ELLIOTT & LUCKY,
Attys. for Plaintiff.

SOUTHERN NAT. BANK OF NEW YORK *vs.* No. 688. A. U. THOMAS & W. G. CURTIS *et al.*	In the District Court, Wilbarger County, Texas, Feby. Term, 1895.

Now comes the plaintiff in the above-entitled and numbered cause, by leave of the Court had and obtained, and files this its amended second supplemental petition in lieu of its second supplemental petition filed herein Feby. 5th, 1895, and makes the same read as follows, to wit:

1st. Plaintiff excepts to defendants Thomas & Curtis's answer and plea of reconvention for damages herein, for that the facts therein alleged are insufficient in law to warrant a recovery thereon—wherefore it prays the judgment of the Court.

2nd. Plaintiff specially excepting, says the allegations of facts therein as to sale of Bank stock by it are insufficient to show that said defendants have been damaged by reason of said sale, or that plaintiff violated its contract with defendants in the

manner in which said Bank stock was sold—wherefore plaintiff prays the judgment of the Court.

3rd. Plaintiff further specially excepting says, that the allegation in said answer, "that the plaintiff, Triebert and Harnett & Co., entered into a combination and conspiracy with each other to defraud these defendants and buy said stock for a nominal sum of money," are insufficient in law, for that the same are too general, and fail to allege the fact, constituting the alleged combination and conspiracy—wherefore, it prays the judgment of the Court.

4th. Plaintiff further specially excepting to the allegations in said answer wherein it is stated "that while the said plaintiff pretended to give notice of sale to these defendants, it gave the notice in so short a time as to render it impossible for these defendants, or either of them, to be present thereat to protect their interest, and further, the notice given these defendants failed to give the place where the sale would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of sale to protect their interest in the sale of stock, for that said facts, if true, do not show that plaintiff violated any contract, truth or duty it owed defendants, for that plaintiff had the right as per the allegations theretofore in said answer, "in case of default or nonpayment of said note at maturity to sell, assign and deliver the whole or any part of securities at any brokers' board, or at public or private sale at the option of said Bank, at any time thereafter without advertisement or notice to defendants, and

with the right on the part of said Bank to become purchaser thereof at said sale or sales, free and discharged from any equity of redemption." And it further appears, that said bank stock was sold after the maturity, default and non-payment of the note, for which said bank stock was pledged to secure, and that, therefore, it was not incumbent on plaintiff to give to defendants any notice to redeem before proceeding to sell said bank stock—wherefore plaintiff prays the judgment of the Court.

5th. Plaintiff further specially excepting because the said answer fails to allege the value of the bank stock in the City of New York, the authorized place of the sale of same, under the pledge as herein or in this cause set forth—wherefore it prays the judgment of the Court.

6th. Plaintiff further specially excepting because defendants' plea of accord and satisfaction fails to allege facts showing a definite agreement, a consideration therefor passing from defendants to plaintiff, or that the same was ever executed or accepted—wherefore it prays the judgment of the Court.

7th. Plaintiff further specially excepting to the defendant H. C. Thomson's plea of reconvention herein: 1st. Because the facts therein alleged are insufficient in law to constitute a cause of action against the plaintiff. 2d. Because the matters of fact alleged therein are in no way connected with, resultant from or incidental to the main action, upon which this suit is instituted by plaintiff herein—wherefore it prays the judgment of the Court.

8th. Plaintiff further specially excepting because the said Thomson, in his said plea of recon-

vention herein in which he undertakes he pleads an implied contract and *quantum meruit* against plaintiff, fails to allege that plaintiff ever promised to pay him, the said Thomson, any sum for his services—wherefore it prays the judgment of the Court.

9th. And answering herein plaintiff denies all and singular the allegations in said amended answer of the said Thomas and Curtis contained, and also the said first amended answer and plea of reconvention of the said H. C. Thomson contained, and demands strict proof of the same, and of this it puts itself upon the country.

10th. And specially answering said plea of accord and satisfaction interposed by the defendants Thomas and Curtis, plaintiff avers and alleges that there was no definite agreement between plaintiff and said defendants thereto; that there was no consideration passing from said defendants to plaintiff to support the same; that if there was a definite agreement upon a valid consideration, which is not admitted but denied, the same was not executed. And further, plaintiff avers that if it ever agreed to the alleged accord and satisfaction pleaded by said defendants, it was induced to do so by the false and fraudulent representations of said defendants as to the value of said bank stock, the said defendant Thomas having represented to plaintiff that said bank stock was worth 80 cents on the dollar, when in truth and in fact said bank stock had no value, but was entirely worthless, void; defendants knew at the time it was worthless. That plaintiff relied on said false and fraudulent representations so made by the defendant Thomas as aforesaid and plaintiff was thereby induced to accept the proposition for defendants to confess judgment in this suit for amount sued for. And that said judgment

to be credited to the amount of sixty cents on the dollar of the eighteen thousand of the bank stock so pledged to plaintiff by the said defendants.

That plaintiff further avers that at the time of the acceptance of said proposition the State National Bank of Vernon was in an insolvent condition, and soon thereafter said bank failed and went into the hands of a Receiver, and so now remains.

That plaintiff at the time knew nothing of the condition and solvency of said bank or the value or intrinsic worth of the one hundred and eighty shares of the capital stock of the State National Bank of Vernon pledged to it as aforesaid, and had it known or been informed of the true condition and solvency of said bank, or value or intrinsic worth of said bank stock, it would not under any circumstances have accepted said proposition of settlement; therefore plaintiff says that if said agreement ever had any validity or binding efficacy on plaintiff, it should be relieved therefrom, because of the said false and fraudulent representations as to the value of said bank stock. Plaintiff further says that said defendants were to confess judgment at the August Term of this Court, August, 1894, which they failed to do—wherefore plaintiff puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

11th. Plaintiff, further answering herein, avers that the defendants Thomas and Curtis deposited with plaintiff as collateral security for payment of the note here sued on the said one hundred and eighty shares of the capital stock of the State National Bank of Vernon, with the written agreement and understanding (the right and authority on the part of plaintiff) that in case of default or non-payment of said note at maturity, to sell, assign

and deliver the whole or any part of such securities or any substitute therefor or additions thereto, at any brokers' board, or at public or private sale, at the option of plaintiff, at any time or times thereafter, without advertisement or notice to said defendants and with the right on the part of plaintiff to become purchasers thereof at said sale or sales, freed and discharged from any equity of redemption. Therefore, if plaintiff proceeded to sell said bank stock (after maturity of said note and default in the payment thereof) without giving said defendants notice of said sale, they are estopped from complaining thereat, because of said defendants' written contract and agreement as aforesaid—wherefore it puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

12th. Further answering herein as to the defendant H. C. Thomson, plaintiff says it denies that it employed said Thomson as attorney to represent it herein to sue alone on said note of said A. U. Thomas & W. G. Curtis and to foreclose its lien upon the bank stock heretofore mentioned, and that it agreed to pay him the sum of one hundred dollars cash as a retainer and ten per cent. of the amount he might recover against said Thomas & Curtis. But the plaintiff here now alleges the facts to be, that it employed the said H. C. Thomson to bring suit against the said Thomas & Curtis upon the note sued on herein, and to litigate said cause to a finish and final judgment against the said defendants Thomas & Curtis, and agreed to pay him for all such services the sum of one hundred dollars as a retainer. in cash (which amount it paid him), and the further sum of ten per cent. upon the amount he might collect from the said Thomas & Curtis upon the said note. And that at the time

of the employment of the said Thomson it was covenanted and agreed and understood by and between the plaintiff and said Thomson that the said compensation so agreed upon as aforesaid was to fully recompense the said Thomson for any and all services he might render plaintiff in said cause to its complete and final consummation. And that thereafter said Thomson had brought the suit under the contract above stated, that he drew upon and demanded the payment by plaintiff of various large sums of money, claimed by him to be due him for services rendered by him herein, which plaintiff had not agreed to pay him, and did not and refused to pay him, by reason of which said refusal by plaintiff to pay him said sums of money so demanded as aforesaid the said Thomson refused to further to prosecute this cause as attorney for plaintiff, and voluntarily withdrew from and abandoned said cause, thereby enforcing and compelling plaintiff to employ another and additional counsel to represent it herein, and plaintiff has fully paid said Thomson for all services rendered by him herein.

And plaintiff denies that said Thomson handled and managed but in a skillful and prudent manner, as a skillful and prudent attorney would manage suits of a similar character, but that, upon the other hand, plaintiff avers that the management of said suit by said Thomson as attorney for plaintiff was of an unskillful, careless, reckless and imprudent and grossly negligent manner, and that his management of same resulted in great complications, impediments, injuries and damages to plaintiff.

Wherefore, plaintiff puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

THE SOUTHERN NAT'L BANK OF NEW YORK *vs.* W. G. CURTIS *et al.*	Suit pending in the District Court of Wilbarger County, Texas, Feby. Term, 1895.

PLAINTIFF'S 3RD AMENDED PETITION.

Now comes the plaintiff, the Southern National Bank of New York, and after obtaining leave of the Court, filed herein its 3rd Amended Petition, intending thereby to amend its 2nd amended petition filed herein on the day of 1895, and for such amendment plaintiff says: That plaintiff is a corporation duly incorporated under the laws of the United States of America as a national bank doing business in the City and State of New York, and that the defendants A. U. Thomas and W. G. Curtis were residents of Wilbarger County, Texas, at time of filing of this suit, and as such properly before the Court, having been duly cited herein.

That heretofore, to wit, on January 20th, 1892, the said defendants, A. U. Thomas and W G. Curtis, made, executed and delivered to plaintiff for value received of it their certain promissory note in writing, bearing date on the day and year last aforesaid, payable to the order of plaintiff, for the sum of $15,000, four months after its date; that no rate of interest is specified in said note, but plaintiff alleges that under the law said note bears interest at 6 per cent. per annum from its date until paid.

Plaintiff here files what in its opinion is a copy of said note, and that if the copy filed is not a true copy thereof plaintiff cannot file a more perfect copy thereof, as the original note is not in its possession, but in the possession of one H. C.

Thomson, who refuses to deliver same to plaintiff or allow it to inspect the same, and said attached copy is asked to be made a part of this petition, and is attached hereto and marked Exhibit A for identification, and that plaintiff is the owner and holder of said note. That there appears to be endorsed on the said copy of said note, and plaintiff presumes said endorsement is also on the said original, note now in the possession of the said H. C. Thomson, the following credit, to wit: "Credited by cash proceeds of sale of stock Twenty Dollars, Aug. 8th, 1893." Which said credit so entered and indorsed as aforesaid is improper and incorrect, and should not have been so entered for that the plaintiff does not claim any right or title to said bank stock, by reason of any attempted or pretended sale of same, but that plaintiff now holds said bank stock as collateral security only, as it has heretofore done, and as fully stated in the said note sued on herein.

That the said bank stock has at all times since the execution and delivery of the note sued on herein been in the possession and under the control of the plaintiff, and plaintiff has always been ready and willing at any and all times, and is now ready and willing to return to defendants the said bank stock upon the payment by them of the said note here sued on by it. And the plaintiff here now tenders in open court to the said defendants the said bank stock upon the payment by them of the said note aforesaid.

That by reason of the said execution and delivery of the aforesaid note by defendants to plaintiff, they became liable to and promised to pay plaintiff, at the maturity thereof, the sum specified herein, with interest as aforesaid. And though payment has often been by it demanded of the said defendants, they have failed, refused and still

fail and refuse to pay same or any part thereof, to plaintiff's damage $20,000.

Wherefore, plaintiff prays judgment of the Court against the said defendants for the amount of said note, with interest and cost, and for general and special relief as in duty bound, etc.

ELLIOTT & LUCKY,
Attys. for Plaintiff.

$15,000. NEW YORK, May 20th, 1893.

Four months after date, for value received, we promise to pay to the order of "The Southern National Bank, of New York," at said Bank, in the City of New York, in funds current at the New York Clearing House fifteen thousand dollars, having deposited with said Bank as collateral security for payment of this or any other liability or liabilities of ours to said Bank, now due or to become due, or that may be hereafter contracted, the following property, viz.: one hundred and eighty (180) shares of the capital stock of the State National Bank of Vernon—as evidenced by

Ctft. No. 97, 150 Sh's
" 98 30 "

(copy) ———————

The market value of which is now $18,000, with the right on the part of said Southern National Bank, of New York, from time to time, to demand such additional collateral security as said Bank may deem sufficient should the market value thereof decline, and upon our failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to said Bank or assigns, in case of such default or of the nonpayment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions

thereto, at any brokers' board, or at public or private sale at the option of said Bank, at any time or times thereafter, without advertisement or notice to us, and with the right on the part of said Bank to become purchasers thereof at said sale or sales, freed and discharged from any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said Southern National Bank, of New York, shall deem proper, returning the overplus to the undersigned; and we will still remain liable for any amount so unpaid.

"Exhibit A" W. G. CURTIS.
725 A. U. THOMAS.

THE SOUTHERN NATIONAL BANK OF NEW YORK
vs.
W. G. CURTIS *et al.*

In the District Court of Wilbarger County, Texas. Feby. Term, 1894.

Now comes the defendant, and deny all and singular the allegations in the plaintiff's petition contained, and demand strict proof of the same.

STEPHENS & HUFF,
Attys. for Defts.

And further answering herein defendants say, the note sued on has been fully paid off, discharged by before the institution of this suit. The plaintiff, The Southern National Bank of New York, having taken the stock that these defendants placed with their collateral security for the indebtedness sued on and declared in the instrument sued on by the plaintiff. That the plaintiff has taken

said stock on the 8th day of August, 1893, which was on said date worth the sum of $18,000, in full satisfaction for said note. Wherefore, defendants ask to be discharged, with their costs.

STEPHENS & HUFF,
Attys. for Defts.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas. February Term, 1894.

Now comes the defendants A. U. Thomas and W. G. Curtis and, after leave of the Court first had and obtained, files this their amended original answer in the place of their original answer heretofore filed on the day of February, 1894, so as to read as follows:

Defendants deny all and singular the allegations in the plaintiff's petition contained and demand strict proof of same, and of this put themselves upon the country.

STEPHENS & HUFF,
Attorneys for the Defendants.

And by way of cross petition and further answer herein these defendants allege and show that they executed the note in the plaintiff's petition described for the sum of ($15,000) fifteen thousand dollars payable to the order of the "Southern National Bank of New York" and to secure the payment of said note these defendants deposited with said Bank as collateral security one hundred and eighty shares of the capital stock of the State National Bank of Vernon evidenced by certificate No. 97 for 150 shares and certificate No. 98 for 30

shares with power on the part of the plaintiff or assigns in case of default or the non-payment of said note at maturity to sell, assign and deliver the whole or any part of the securities at any broker's board or at public or private sale at the option of said Bank, at any time thereafter without advertisement or notice to defendants and with the right on the part of said Bank to become purchasers thereof at said sale or sales freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the State National Bank of Vernon and for one hundred dollars for each share, aggregating the sum of and representing eighteen thousand dollars of the capital stock of said State National Bank.

That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular and has done so for the purpose of cheating and defrauding these defendants out of said stock and of holding over these defendants the entire debt for which said stock was given to secure. That the plaintiff instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Co., a firm in New York City of whom these defendants had no knowledge, and who were never in any way authorized by these defendants to sell said stock. Nor was the plaintiff authorized by these defendants in any way to substitute any one in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the plaintiff was a gross and palpable violation of the trust in reference to the sale of said stock. That while these defendants waived the notice and advertisement of the sale, they did not waive their rights under the law to receive

notice to redeem the pledge, and that the plaintiff procured the sale of said stock to be made as aforesaid without giving these defendants notice to redeem the stock as it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out; that said sale and purchase was made on the 8th day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars and paid the said Harnett & Co. eight dollars of that for making the sale. That the plaintiff, Treibert and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock for a nominal sum of money. That while the said plaintiff pretended to give notice of sale to these defendants, that it gave the notice in so short a time as to render it impossible for these defendants or either of them to be present thereat to protect their interest, and further, the notice given these defendants failed to give the place, when the sale would be made and by whom it would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of sale to protect their interest in the sale of the stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock aforesaid, adverse to all rights and claims of these defendants, that it has converted the said stock to its own use and benefit and thereby became liable

to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the fraudulent and wrongful acts of the plaintiff as aforesaid, the plaintiff became liable to these for the value of the stock at the date of the filing of the competition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars. That by reason of such wrongful acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for that sum of money, but that it has wholly failed and refused to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff the 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, and that the said plaintiff caused the said Harnett & Co. to sell the stock in the manner and form as above set out, and for the purposes as therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and of the law and powers as aforesaid on the said 8th day of August, 1893. That on said date aforesaid there was a general financial depression all over the country, and in business and in financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon owing to such financial depression and want of confidence in the banking institutions of the United States then existing in the business and financial world. That owing to the financial stress then generally prevailing, the State National Bank of Vernon suspended business for a short time as was so suspended at the date of the sale of said stock.

That while there was no market value for the said stock at said date, it possessed an actual and intrinsic value for the purposes of banking, or as stock upon which dividends would finally be declared, and as an investment of good security; the sum of eighty-five cents on the dollar, as of the aggregate value of the 180 shares of fifteen thousand three hundred dollars, but that said stock is now, and at the time of the answer of these defendants, worth the sum of eighteen thousand dollars. That by the wrongful and fraudulent acts of plaintiff, and its breach of trust as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in the said sum, but has refused to pay the same or any part thereof.

And further answering herein, these defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon deposited with the plaintiff the certificate of stock above set out under the powers hereinbefore mentioned. That the pledge as herein stated was for the mutual benefit and interest of the plaintiff and these defendants. That the plaintiff accepted the same and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale and care of handling said stock. But although the plaintiff had so accepted said trust and undertook to use reasonable diligence in the sale of the same and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale of said stock as to sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by defendants to plaintiff. That

it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry off at public outcry in the midst of a financial panic when securities of all kinds and classes were of uncertain sale, and without in any way ascertaining the true value of the stock and without attempting to inform the public who attend auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledges at all entering into consideration, forced such stock upon the market when it was bound to know nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid the plaintiff only realized the sum of twenty dollars, when in fact the same was of the value of fifteen thousand three hundred dollars, the sum being the real intrinsic value of said stock as hereinbefore set out. That by reason of all which these defendants have been damaged in the sum of eighteen thousand dollars, whereby the plaintiff became liable to these defendants in said sum of money to pay the same or any part thereof, the plaintiff has wholly failed and refused to do, to defendant's great damages.

Wherefore, these defendants sue to recover their damages as above set out and pray that the amount so received be set off against the note, and that if there should be any excess over and above the amount of the note that they may be due thereon, that they have judgment therefor over against the plaintiff, and for such and further equitable relief as they may be entitled in good conscience and for general relief.

STEPHENS & HUFF,
Attys. for Defts.

That these defendants allege as they have heretofore stated and alleged, the pledge of said stock in the manner and form as above set out for the purpose of securing the defendant as therein set out. That the same was sold in the irregular and fraudulent manner aforesaid and purchased by the plaintiff as hereinbefore set out, under all the irregularities, as hereinbefore set out. That these defendants allege the value of said stock to be as set out in the several counts or allegations of this cross petition hereinbefore pleaded. That the plaintiff held all this great amount of property which was of the great values hereinbefore stated in trust for the purpose of selling and paying said note, but that by reasons of its wanton and fraudulent acts, as hereinbefore stated, the stock was sold. at which sale plaintiff purchased all of said stock at the grossly inadequate and inconceivable price of twenty dollars, and thereby defrauded these defendants of their rights in said stock.

Wherefore, these defendants ask this Court to set aside the sale, if the Court should find they are not entitled to receive its value upon conversion or for damages as herebefore prayed for, and that they have a decree foreclosing the lien on said stock and that it be sold under the order of this Court, and that the Court direct the payment of the proceeds in the note and for such other and further relief as in law or equity these defendants may be entitled, and for general relief.

STEPHENS & HUFF,
Attys. for Defendant.

The Southern National Bank of New York *vs.* No. 688. A. U. Thomas *et al.*	In the District Court of Wilbarger County, Texas. February Term, A. D. 1895.

First Amended Answer of Defendant H. C. Thomson.

Now comes defendant H. C. Thomson, one of the defendants in the above-styled cause, and amends his original answer filed herein Dec. 6th, 1894, and for such amendment pleads as follows:

The said H. C. Thomson denies all and singular the allegations contained in plaintiff's first amended original petition filed herein on Dec. 5th, 1894, and demands proof thereof.

Basham & Hall,
Attys. for Deft. Thomson.

Count No. 1.

And specially answering herein, and pleading in reconvention against the plaintiff, defendant H. C. Thomson charges that on or about the 10th day of August, 1893, he, as attorney for the plaintiff in this suit, by special contract filed suit No. 688 in the District Court of Wilbarger County, Texas, and styled The Southern National Bank of New York *vs.* W. G. Curtis and A. U. Thomas, on a note for fifteen thousand dollars ($15,000.00) less a credit of $20.00 entered August 8th, 1893. That said defendants Thomas and Curtis were duly cited in said cause and made answer to plaintiff's cause of action. That by the terms of the contract of employment made by plaintiff with this defendant Thomson, the plaintiff agreed and promised to pay this defendant the sum of one hundred dollars ($100.00) in cash as a retainer for filing said suit,

and ten per cent. of the amount of said above mentioned note. That he might recover from said Thomas and Curtis by suit on said note, save and except that the services charged to have been performed by defendant Thomson, as specified and set out in second count of this answer, were not included in said contract by the parties thereto.

That this defendant in his conduct and management of said lawsuit managed same in a skillful and prudent manner, and as a skillful and prudent attorney would do in suits of a similar character. That this defendant prepared and filed interrogatories to various parties in the City of New York, and had them taken and filed in said cause to make proof of the allegations and facts set forth in plaintiff's original petition, filed in said cause in said suit No. 688. That this defendant, as attorney for the plaintiff, managed and conducted said cause from on or about the 10th day of August, 1893, for about one year, and had the same fully prepared and ready for trial. That some time in the month of August, 1894, this defendant was unable to give the exact date, the plaintiff settled and compromised said suit with defendants Thomas and Curtis, whereby the said plaintiff agreed and accepted in settlement thereof $18,000 face value of the capital stock of the State National Bank of Vernon, Texas, at Vernon, Texas, at the price of sixty cents on the dollar, or a total of ten thousand and eight hundred dollars, for said stock and for the balance of said debt on which said suit No. 688 was brought, the defendants Thomas and Curtis were to confess judgment in favor of the plaintiff. That said settlement was fully agreed to by the plaintiff and defendants Thomas and Curtis, and that if said settlement was not fully carried out it was no fault of this defendant nor of defendants Thomas and Curtis. That said settlement was made

without the knowledge of this defendant, and said suit was taken out of his hands without his consent, for the purpose of making said settlement. That said settlement was made for a valuable consideration, and binding on the parties thereto; that by the terms of plaintiff's contract with this defendant he is entitled to receive the sum of one thousand and eighty dollars from the plaintiff on account of said settlement, which they have never paid him, but fail and refuse to make payment thereof, and do now fail and refuse to pay, for which said amount this defendant is entitled to judgment in addition to the sum of money claimed in the second count of this answer, and for which this defendant now prays judgment of the Court, and that he be allowed to retain the note now in his possession until all sums due him from the plaintiff be fully paid.

BASHAM & HALL and H. C. THOMSON,
Attys. for Deft. Thomson.

Count No. 2.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* No. 688 A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas. February Term, A. D. 1895.

And further specially answering herein, and pleading in re-convention against the plaintiff, defendant H. C. Thomson charges that on or about the 10th day of August, 1893, he as attorney for the plaintiff herein, at its special instance and request, filed suit No. 688, in District Court of Wilbarger County, Texas, styled, The Southern National Bank of New York *vs.* W. G. Curtis and A. U. Thomas, on a note for $15,000.00, fifteen

thousand dollars, less a credit of $20.00, twenty dollars, entered Aug. 8th, 1893. That said defendants Curtis and Thomas were duly cited in said cause and made answer to plaintiff's cause of action, and reconvened in damages against the plaintiff by answer filed on or about the 8th day of February, 1894, in said cause No. 688, claiming damages in the sum of eighteen thousand dollars against plaintiff for the wrongful conversion of certain bank stock in the City of New York on or about the 8th day of August, 1893, alleged to belong to and the property of defendants Thomas and Curtis. That the defendant Thomson, as attorney for said bank, plaintiff herein, and in his capacity as attorney-at-law, and at the special instance and request of plaintiff herein filed defensive pleadings to the said claim for damages of said Thomas and Curtis in said cause No. 688, and also took a great deal of testimony in the City of New York and elsewhere, to defend, controvert and resist said claim for damages brought in reconvention by said Thomas and Curtis in said cause No. 688, and otherwise performed valuable and substantial service in defense of said action in reconvention for damages from August 10th, 1893, up to on or about Aug. 10th, 1894; that this defendant resisted motions to suppress plaintiff's testimony and made agreements, valuable and profitable to plaintiff in said cause; that said services in so resisting, defending and controverting said cross action for damages were not embodied or included in the contract set forth in Count No. 1 of this answer, and the same were and are reasonably worth the sum of twelve hundred dollars; that on or about the said August 10th, 1894, the plaintiff herein discharged defendant Thomson from said cause No. 688, and refused to allow him to further conduct said cause, and refused to pay him for his services

therein rendered without any fault or negligence on the part of the said Thomson in the management or conduct of said cause. That said Thomson during the conduct and management of said cause managed the same in a skillful and prudent manner and as a prudent and skillul attorney would do in suits of a similar character; that the reason plaintiff discharged defendant Thomson was because this defendant demanded of it a reasonable compensation for the services rendered, and to be rendered in the defense of the cross action of Thomas and Curtis, and notified said Thomson that it would fail and refuse to pay him, the said Thomson, for the services at a reasonable price he had performed in said cause No. 688, in defense of said cross action for damages, or would perform in the future, and notified said Thomson that it would pay nothing therefor. But no notice was ever given the said Thomson that his services would not be paid for until said suit No. 688 was fully ripe for trial, and had so been prepared by said Thomson, at the special instance and request of plaintiff.

Defendant Thomson further charges that he has an attorney's lien on the note set out and described in plaintiff's petition, and that said note is now in his possession, and came into his possession as attorney for the plaintiff, and while engaged in the management of this action; that plaintiff has failed and refused, and still fails and refuses, to pay this debt, the said sum of twelve hundred dollars, due for the services performed and set forth in this the second count of defendant's answer.

Wherefore, premises considered, this defendant prays for judgment, for the said sum of twelve hundred dollars, alleged to be due in the Second Count hereof, and also the further sum one thousand and eighty dollars, alleged to be due in the First Count of this answer, aggregating the sum of

twenty-two hundred and eighty dollars, together with interest on each sum, at the rate of 6 per cent. per annum, from August 10th, 1894, and that he be allowed to retain the note in his possession until all sums due him by the plaintiff be fully paid, for further costs of suit and general relief.

H. C. THOMSON and BASHAM & HALL,
Attys. for Defendant Thomson.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* W. C. CURTIS *et al.*	In the District Court of Wilbarger County, Texas. February Term, 1895.

Now come the defendants W. G. Curtis and A. U. Thomas, and after leave of the Court first had and obtained, file this their third amended original answer in lieu of their second amended original answer, filed herein on the 14th day of September, 1894, and make the same read as follows:

1st. Defendants deny all and singular the allegations in plaintiff's petition contained, and demand strict proof of the same; and of this they put themselves upon the country.

STEPHENS & HUFF,
Attys. for Defendants.

And by way of cross petition and further answer herein, these defendants allege and show that they have executed the note in plaintiff's petition contained and described for the sum of fifteen thousand dollars, payable to the order of "The Southern National Bank of New York," and to secure the payment of said note these defendants deposited with said Bank as collateral security one

hundred and eighty shares of the capital stock of "The State National Bank of Vernon," evidenced by Certificate No. 97 for 150 shares, and certificate for 30 shares, with power on the part of plaintiff or assigns, in case of default or non-payment of said note at its maturity, to sell, assign and deliver the whole or any part of the securities at any broker's board, or at public or private sale at the option of said bank, at any time thereafter, without advertisement or notice to defendants, and with the right on the part of said Bank to become purchaser thereof at said sale or sales, freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the "State National Bank of Vernon," and for one hundred dollars for each share, aggregating the sum and representing eighteen thousand dollars of the capital stock of said State National Bank of Vernon.

That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out, and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular, and has done so for the purpose of cheating and defrauding these defendants out of said stock, and of holding over these defendants the entire debt for which said stock was given to secure.

That the plaintiff, instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Company, a firm in New York City, of whom these defendants had no knowledge, and who were never in any way authorized by defendants to sell said stock; nor was the plaintiff authorized by these defendants in any way to substitute any one else in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the

plaintiff was a gross and palpable violation of its trust in reference to the sale of said stock. That while these defendants waived the notice and advertisement of sale, they did not waive their right under the law to receive notice to redeem the stock or it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out. That said sale and purchase was made on the 8th day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars and paid the said Harnett & Co. eight dollars of that for making the sale. That plaintiff Trieber and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock at a nominal sum of money. That while the said plaintiff pretended to give notice to these defendants, it gave the notice in so short a time as to render it impossible for these defendants, or either of them, to be present thereat or to protect their interest; and further, the notice given these defendants failed to give the place where the sale would be made, and by whom it would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Company, and were thereby prevented from being present either in person or by agent at the place of sale to protect their interest in the sale of said stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock aforesaid, adverse to all rights and claims of these

defendants, that it has converted the said stock to its own use and benefit, and thereby became liable to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the said fraudulent and wrongful acts of the plaintiff, the plaintiff became liable to these defendants for the value of said stock at the date of the filing of the cross petition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars.

That by reason of such wrongful acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for that sum of money, but that it has wholly failed to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff the 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, &c. That plaintiff caused the said Harnett & Co. to sell said stock in the manner and form above set out, and for the purposes therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and the law and powers as aforesaid, on the 8th day of August, 1893.

That on said date as aforesaid, there was a general financial depression all over the country, and in business and financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon, owing to such financial depression and want of confidence in the banking institutions of the United States, then existing in the business and financial world. That owing to the financial stress then prevailing generally, the State National

Bank of Vernon suspended business for a short time, and was so suspended at the date of the sale of the said stock. That while there was no market value for the said stock at said date, it preserved an actual and intrinsic value for the purpose of banking, or as stock upon which dividends would finally be declared, and as an investment of good security the sum of eighty-five cents on the dollar, or of the aggregate value for the 180 shares of fifteen thousand three hundred dollars, but that said stock is now at the time of the answer of these defendants worth the sum of eighteen thousand dollars.

That by the wrongful and fraudulent acts of plaintiff and its breach of trust as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in said sum, but has refused to pay the same or any part thereof.

And further answering herein, the defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon, deposited with the plaintiff the certificate of stock above set out under the powers hereinbefore mentioned.

That the pledge herein stated was for the mutual benefit and interest of plaintiff and these defendants. That the plaintiff accepted the same and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale, care and handling of said stock. But although plaintiff had accepted said trust and undertaken to use reasonable diligence in the sale of the same, and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale

of said stock as to sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by these defendants to plaintiff. That it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry off at public outcry in the midst of a financial panic when securities of all kind and classes were of uncertain sale, and without in any way ascertaining the true value of the stock, and without attempting to inform the public who attended auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledgors at all entering into the consideration, forced such stock upon the market when it was bound to know that nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid, the plaintiff realized only the sum of twenty dollars when in fact the same was of the value of fifteen thousand dollars, the same being the real and intrinsic value of said stock as hereinbefore set out. That by reason of all of which these defendants have been damaged in the sum of fifteen thousand dollars, whereby the plaintiff became liable to these defendants in said sum of money, but to pay the same or any part thereof plaintiff has wholly failed and refuse to do, to defendants' great damage.

Wherefore, these defendants ask to receive their damages as above set out, and pray that the amount so recovered be set off against the note, and that if there should be any excess over and above the amount of the note, that there may be due thereon, that they have judgment therefor over against the plaintiff, and for such other and further equitable

relief as they may be entitled in good conscience and for general relief.

STEPHENS & HUFF,
Attys. for Defts.

Since the filing of the cross petition heretofore on the 8th day of August, 1894, the plaintiff, for a valuable consideration, and for the purpose of settling the litigation in and about the stock which these defendants allege plaintiff wrongfully sold and converted as hereinbefore set out, and for the purpose of saving any further costs in regard to said cross action for said stock and the wrongful conversion of same, made and entered into a contract with these defendants to settle said suit. That the same was made through one M. J. Tompkins. That said Tompkins was duly authorized by defendants to make a proposition to the plaintiff to settle said litigation, which proposition was duly made by said Tompkins to plaintiff, which was duly accepted, and which proposition and acceptance was in substance, that these defendants would acknowledge the justness of the indebtedness sued upon by plaintiff, and that they would confess judgment for said sum sued for, and that these defendants should have a credit on said judgment for an amount equal to sixty cents on the one dollar on said stock. That there was 180 shares of stock of said bank of the value of one hundred dollars per share, and that sixty cents on the dollar would aggregate $10,800 dollars. That under said agreement aforesaid, these defendants are entitled to a credit for said sum of $10,800 on the judgment. That these defendants are now ready and willing to carry out their contract and agreement entered into as aforesaid, and will now confess judgment for said amount sued for upon credit for said $10,800 being given them.

Wherefore, they pray that said agreement be carried out and put into execution, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

SOUTHERN NATIONAL BANK OF NEW YORK
vs. No. 688.
W. G. CURTIS *et al.*
Sept. 9th, 1895.

This cause having been reached for trial several days prior to this date, and all parties having by attorneys announced ready for trial and submitted all questions of law as well as of fact to the Court, without the intervention of a jury. The Court, after hearing the evidence and argument of counsel, took said case under consideration and returned into Court this day his judgment and findings of fact and law. The Court finds the plaintiff is entitled to recover on said note the sum of sixteen thousand two hundred dollars ($16,200), principal and interest on the note sued on up to the 9th day of August, 1894, the time the agreement of compromise was entered into by and between plaintiff and defendants W. G. Curtis and A. U. Thomas; and that under said agreement said defendants are entitled to a credit of ten thousand eight hundred dollars ($10,800), and that the plaintiff is now entitled to recover from defendants, W. G. Curtis and A. U. Thomas, principal, and interest on the remainder after deducting said ten thousand eight hundred dollars ($10,800), the sum of five thousand seven hundred and fifty-one dollars ($5,751.00), with interest thereon at the rate of six per cent. per annum from this date.

It is therefore ordered, adjudged and decreed by

the Court that the plaintiff, The Southern National Bank of New York, a corporation, do have and recover of and from the defendants, W. G. Curtis and A. U. Thomas, the sum of five thousand seven hundred and fifty-one dollars ($5,751), with interest thereon from the date of this judgment at the rate of ten per cent. per annum, together with all costs in this behalf expended, for which the plaintiff may have its execution. And it further appearing that one of the defendants, H. C. Thomson, was made a party defendant by the plaintiff and sued for damages, and that the said H. C. Thomson reconvened and sued the plaintiff for legal services herein, the Court finds that the said H. C. Thomson is entitled to recover of the plaintiff the sum of one thousand dollars ($1,000) for such services, and that the plaintiff having withdrawn and abandoned its claim for damages against the said H. C. Thomson prior to the trial hereof, but after filing said petition for damages and service of process on the said H. C. Thomson, and after the said H. C. Thomson had filed his answer and plea of reconvention, take nothing as against the defendant H. C. Thomson.

It is therefore ordered, adjudged and decreed by the Court that the said H. C. Thomson do have and recover of and from the plaintiff, The Southern National Bank of New York, the sum of one thousand dollars ($1,000), with interest thereon at the rate of six per cent. per annum from the date of this judgment, and all costs in this behalf expended, for which he may have his execution.

It is further ordered that the officers of this Court may have execution in their behalf against each party for the costs incurred by them respectively, for which they may have execution. To all of which plaintiff then and there excepted, and gave notice of appeal to the Court of Civil Appeals

of the Second Supreme Judicial District of Texas. And the plaintiff is granted ten days by the Court, from and after the adjournment of this Court, in which to prepare and file a statement of facts in this cause.

(Certificate of True Copy.)

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original pleadings now on file, together with the final judgment in the case of The Southern National Bank of New York *vs.* A. U. Thomas *et al.*, now on file in said Court, in Cause No. 688.

Given under my hand and seal of said Court, at office in the town of Vernon, this the 24th day of March, A. D. 1898.

[SEAL.]

W. B. TOWNSEND,
Clerk District Court Wilbarger County, Texas.

By C. P. SMITH, Deputy.

THE STATE OF TEXAS, }
Wilbarger County. }

I, G. A. BROWN, Judge of the 46th Judicial of Texas, including Wilbarger County, do hereby certify that W. B. Townsend, whose name is signed in the foregoing certificate, is the duly elected, qualified and acting Clerk of the District Court in and for Wilbarger County, and that C. P. Smith is his qualified and acting deputy, and that the signature of the said C. P. Smith to the

foregoing certificate is genuine, and that said attestation is in due form.

Given under my hand and the seal of
[SEAL.] the District Court this the 26th day of March, 1898.

G. A. BROWN,
Judge 46th Judicial District of Texas.

THE SOUTHERN NATIONAL BANK OF NEW YORK No. 688. *vs.* W. G. CURTIS *et al.*	In the District Court of Wilbarger County, Texas. August Term, A.D. 1894.

Now come the defendants W. G. Curtis and A. U. Thomas, and after leave of the Court first had and obtained, file this their Second Amended Original Answer in lieu and stead of their other answer heretofore filed February 5th, 1894, and amend original answer February 8th, 1894, and cause the same to read as follows:

1st. Defendants deny all and singular the allegations in plaintiff's original petition contained, and demand strict proof of same. And of this they put themselves upon the country.

STEPHENS & HUFF,
Attys. for Defendants.

And by way of cross petition and further answer herein, these defendants allege and show that they executed the note in plaintiff's petition described for the sum of fifteen thousand dollars ($15,000), payable to the order of "The Southern National Bank of New York," and to secure the payment of said note these defendants deposited with said Bank as collateral security one hundred and eighty shares of the capital stock of "the State National

Bank of Vernon," evidenced by certificate No. 97 for 150 shares and certificate 98 for 30 shares, with power on the part of plaintiff or assigns in case of default or the non-payment of said note at maturity to sell, assign and deliver the whole or any part of the securities at any broker's board, or at public or private sale at the option of said bank, at any time thereafter without advertisement or notice to defendants, and with the right on the part of said Bank to become purchaser thereof at said sale or sales, freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the State National Bank of Vernon, and for one hundred dollars for each share, aggregating the sum of and representing eighteen thousand dollars of the capital stock of the said State National Bank of Vernon. That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out, and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular, and has done so for the purpose of cheating and defrauding these defendants out of said stock and of holding over these defendants the entire debt for which said stock was given to secure. That the plaintiff, instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Co., a firm in New York City and of whom these defendants had no knowledge, and who were never in any way authorized by defendants to sell said stock; nor was the plaintiff authorized by these defendants in any way to substitute any one in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the plaintiff was a gross and palpable violation of its trust in reference to the sale of said stock. That while these defendants

waived the notice and advertisement of sale, they did not waive their right under the law to receive notice to redeem the pledge, and that the plaintiff procured the sale of said stock to be made as aforesaid without giving the defendants notice to redeem the stock or it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out; that said sale and purchase was made on the eighth day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars, and paid the said Harnett & Co. eight dollars of that for making the sale. That the plaintiff, Trieber and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock for a nominal sum of money. That while the said plaintiff pretended to give notice of sale to these defendants, it gave the notice in so short a time as to render it impossible for these defendants or either of them to be present thereat to protect their interest; and, further, the notice given these defendants failed to give the place where the sale would be made, or by whom it would be made; and these defendants, believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of the sale to protect their interest in the sale of the stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock

aforesaid adverse to all right and claim to these defendants, that it has converted the said stock to its own use and benefit, and thereby became liable to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the said fraudulent and wrongful acts of the plaintiff, the plaintiff became liable to these defendants for the value of the said stock at the date of the filing of the cross petition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars. That by reason of such wrong acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for the said sum of money, but that it has wholly failed to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, &c. That said plaintiff caused the said Harnett & Co. to sell the said stock in the manner and form as above set out, and for the purpose as therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and the law and powers as aforesaid on the said 8th day of August, 1893. That on said date aforesaid, there was a general financial depression all over the country and in business and financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon, owing to such financial depression and want of confidence in the banking institutions of the United States then existing in the business and financial world. That owing to the financial stress then prevailing gen-

erally, the State National Bank of Vernon suspended business for a short time, and was so suspended at the date of the sale of the said stock. That while there was no market value for the said stock at said date, it preserved an actual and intrinsic value for the purposes of banking, or as stock upon which dividends would finally be declared, and as an investment of good security, the sum of eighty-five cents on the dollar, or of the aggregate value for the 180 shares of fifteen thousand three hundred dollars, but that said stock is now and at the time of the answer of these defendants worth the sum of eighteen thousand dollars. That by the wrongful and fraudulent acts of plaintiff, and its breach of trust, as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in said sum, but has refused to pay the same or any part thereof.

And further answering herein, these defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon deposited with the plaintiff the certificates of stock above set out under the powers hereinbefore mentioned. That the pledge herein stated was for the mutual benefit and interest of the plaintiff and these defendants. That the plaintiff accepted the same, and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale, care and handling of said stock. But, although the plaintiff had accepted said trust, and undertook to use reasonable diligence in the sale of the same, and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale of said stock as to

sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by these defendants to plaintiff. That it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry out at public outcry in the midst of a financial panic when securities of all kind and classes were of uncertain sale, and without in any way ascertaining the true value of the stock, and without attempting to inform the public who attend auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledgees at all entering into the consideration, forced such stock upon the market when it was bound to know that nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid the plaintiff realized only the sum of twenty dollars, when in fact the same was of the value of fifteen hundred dollars, the same being the real and intrinsic value of said stock, as hereinbefore set out. That by reason of all of which these defendants have been damaged in the sum of eighteen hundred dollars, whereby the plaintiff became liable to these defendants in said sum of money, but to pay the same, or any part thereof, plaintiff has wholly failed and refused to do, to defendant's great damage.

Wherefore these defendants ask to receive their damages as above set out, and pray that the amount so recovered be set off against the note, and that if there should be any excess over and above the amount of the note that may be due thereon that they have judgment therefor over against the plaintiff, and for such other and further

equitable relief as they may be entitled in good conscience, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

That these defendants allege, as they have heretofore stated and alleged, the pledge of said stock in the manner and form as above set out, for the purpose of securing the debt as therein set out; that the same was sold in the irregular and fraudulent manner aforesaid and purchased by the plaintiff as hereinbefore set out, under all the irregularities as hereinbefore set out. That these defendants allege the value of said stock to be as set out in the several counts or allegations of this cross position hereinbefore pleaded. That the plaintiff held out this great amount of property, which was of the great value hereinbefore stated, for the purpose of selling and paying said note, but that by reason of its wanton and fraudulent acts as hereinbefore stated that said stock was sold, but at which sale the plaintiff purchased all of said stock at the grossly inadequate and unconscionable price of twenty dollars, and thereby defrauded these defendants of their rights and equities in said stock.

Wherefore, these defendants ask this Court to set aside said sale, if the Court should find that they are not entitled to recover its value upon conversion or for damages as hereinbefore prayed for, and that they have a decree foreclosing the lien on said stock, and that it be sold under the order of this Court, and that the Court direct the payment of the proceeds on the note, and for such other and further relief as in law or equity these defendants may be entitled, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

That since the filing of the cross petition of de-

fendants heretofore on the 8th day of August, 1894, the plaintiff for a valuable consideration, and for the purpose settling the litigation made and entered into a contract with and through M. J. Tompkins to settle said suit, that he, the said Tompkins, was duly authorized to act for the plaintiff, and that he, the said Tompkins, was authorized to make proposition to the plaintiff for these defendants, which he did, and which proposition was duly accepted by plaintiff, and which was in substance that these defendants would confess judgment in the suit, for amount sued for, and that they should have a credit for sixty cents on the dollar on said stock sold by the plaintiff and placed as collateral security on said indebtedness. These defendants aver the aggregate amount of credit which they would be entitled under said agreement would be the sum of ten thousand eight hundred dollars ($10,800). That they are now ready and willing to carry out their contract and agreement, provided the plaintiff will give them the credit as above set out.

Wherefore, they pray that said agreement be carried out and put into execution, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

(Certificate of True Copy.)

THE STATE OF TEXAS, }
County of Wilbarger. }.

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original defendants' second amended original answer in the case of the Southern National

Bank of N. Y. *vs.* W. G. Curtis *et al.*, now on file in said Court, in cause No. 688.

Given under my hand and seal of said
[SEAL.] Court, at office in the Town of Vernon, this the 18th day of April, A. D. 1898.

W. B. TOWNSEND,
Clerk District Court, Wilbarger County, Texas.

By C. P. SMITH, Deputy.

THE STATE OF TEXAS, }
Wilbarger County. }

I, G. A. BROWN, Judge of the District Court in and for Wilbarger County, Texas, do hereby certify that W. B. Townsend is the duly elected, qualified and acting clerk of said District Court, and that C. P. Smith is his lawful and acting deputy, and that the certificate of the said District Clerk as the same appears above is in due form and the signature of the said C. P. Smith thereon is genuine.

Given under my hand and the seal of the
[SEAL.] said Court this the 19th day of April, 1898.

G. A. BROWN,
Judge Forty-sixth Judicial District of Texas, including Wilbarger County.

The plaintiff then read in evidence the findings in that case in the District Court and the Civil Court of Appeals, as follows:

SOUTHERN NAT. BANK OF NEW YORK *vs.* CURTIS *et al.* } (Court of Civil Appeals of Texas. June 27, 1896.)

Appeal from District Court, Wilbarger County, G. A. Brown, Judge.

Action by the Southern National Bank of New

York against W. G. Curtis and others. From the judgment rendered, plaintiff appeals. Reversed.

Conclusions of fact found by the trial Court, and adopted by the Court of Civil Appeals in its opinion.

"January 20, 1893, the defendants W. G. Curtis and A. U. Thomas executed and delivered to the plaintiff, the Southern National Bank of New York, their promissory note for $15,000, payable four months after date, at the office of said bank, in the city of New York, and at the same time deposited with said bank, as collateral security for said note, 180 shares of stock of $100 each, of the State National Bank of Vernon, Tex., and which stock was then estimated and agreed to be of value $18,000. The written contract between plaintiff and Curtis and Thomas stipulated, among other things, that, if said note was not paid at maturity, the said plaintiff bank should have the right to sell said bank stock at any broker's board, or at public or private sale, at any time after such default of payment without advertisement or notice to the said Curtis and Thomas, and with the right of said plaintiff bank to purchase said shares of stock free from any equity of redemption, and, after deducting legal costs of sale, the proceeds of said shares of stock were to be applied on said $15,000 debt, etc. Said $15,000 note was not paid, and, after the same became due, plaintiff bank offered to extend time of balance if Curtis and Thomas would pay $5,000; and by telegram of June 2d, and by letter of June 7th, both addressed to W. G. Curtis, at Vernon, defendants were informed that, unless plaintiff's proposition was complied with by June 20th, said bank stock would be sold at public auction in New York, and legal proceedings instituted for any deficiency. Defendants Curtis and Thomas failed to comply with the above-mentioned prop-

osition, or to make any other arrangements relative to said note, and on 8th August, 1893, plaintiff caused said shares of stock to be sold at public auction in New York City, when plaintiff became the purchaser at $20, paid the auctioneer $8 cost of sale, and credited the defendants' note with $12 and on the 10th day of August, 1893, brought this suit to recover of the said Curtis and Thomas the balance due on said $15,000 note. At the February Term, 1894, of this court, the defendants Curtis and Thomas answered said suit, charging an illegal sale of said bank stock, and a conversion thereof by plaintiff, to the damage of the said Curtis and Thomas $18,000. August 9, 1894, while suit was still pending on the issues made by the answer of Curtis and Thomas above stated, and for the purpose of settlement of this suit between them, plaintiff bank and Curtis and Thomas, through said Thomas, who was acting for both defendants, entered into an agreement that plaintiff would allow Curtis and Thomas 60 cents on the dollar for said bank stock, and they (Curtis and Thomas) were to confess judgment in plaintiff's suit on said note. This court was in session during the entire months of August and September, 1894, but was temporarily adjourned at the date of said compromise agreement, and for about one week thereafter; and said agreement was not carried into judgment because of said temporary adjournment, and because, after reconvening of said Court, plaintiff had no attorney until after it abandoned said contract. Plaintiff afterwards refused to carry out said agreement, and seeks to recover the full amount of said $15,000 note, having tendered said bank stock into Court for defendants Curtis and Thomas upon the payment of said note. Sixty cents on the dollar of said bank stock is in the aggregate $10,800. On the 8th of August,

1893, when said bank stock was sold, the State National Bank of Vernon was in the hands of the United States Comptroller, having suspended business and closed its doors for want of funds to pay depositors, and at said date said bank stock had no value in the City of New York or in Vernon, Tex.

"On the issues between the plaintiff, the Southern National Bank, and H. C. Thomson, I find the following facts, viz.: On the 1st day of August, 1893, plaintiff employed the said H. C. Thomson, an attorney residing in Vernon, to institute and prosecute this suit against W. G. Curtis and A. U. Thomas, for the recovery of such balance as might remain unsatisfied after applying the proceeds from sale of the $18,000 bank stock, which sale it was understood should be made before the filing of said suit. The fee to be paid by plaintiff was agreed on at the time of said employment, viz.: $100 cash and 10 per cent. on such sum as he should finally collect on said claim, exclusive of the amount which should be realized from the sale of said bank stock by plaintiff in New York. Thompson knew at the time of his employment that Curtis and Thomas would have the right to reconvene in said suit for any damages, real or imaginary, arising from the sale of said bank stock, and in fact, when Thompson accepted said employment, he anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock. After the defendants Curtis and Thomas filed in said cause their plea in reconvention for damages, Thompson demanded an additional fee of plaintiff, which plaintiff declined to pay. Thompson threatened to abandon the case if an additional fee was not paid, and did actually quit the case the 10th day of August, 1894, which was the next day after the agreement of compromise between plaintiff and defendants Curtis and Thomas. The compromise

agreement above mentioned was effected through negotiations directly between plaintiff bank and Curtis and Thomas, and the attorney, Thompson, had no knowledge of such negotiations or agreement until after his abandonment of plaintiff's case. Before Thompson quit plaintiff's case, he prepared the necessary pleadings controverting and replying to said plea in reconvention, and prepared several sets of interrogatories, and caused depositions to be taken relative to said plea. The services rendered by Thompson for plaintiff prior to his withdrawal from the case, and before the compromise thereof, were reasonably worth $1,000, none of which has ever been paid."

R. P. Elliott and J. A. Lucky, for appellant.

Stephens & Huff, Basham & Hall, and H. C. Thompson, for appellees.

STEPHENS, *J.*: This suit was originally instituted in the summer of 1893 by appellant, a national bank, doing business in New York City, against A. U. Thomas and W. G. Curtis, of Vernon, Tex., on the promissory note of the latter in the sum of $15,000. The execution and delivery of this note to appellant was attended with a collateral delivery of 180 shares of the capital stock of the State National Bank of Vernon, then valued at $18,000, belonging to Thomas and Curtis. In accordance with the terms of the contract pledging this stock, appellant caused the same to be publicly sold on the stock market in New York, and became the purchaser thereof for $20, just prior to the bringing of the suit. Appellee H. C. Thompson, an attorney of the Vernon Bar, instituted the suit for appellant under a contract of employment which definitely fixed his compensation at $100 retainer, then paid, and 10 per cent. of what he might collect from

Thomas and Curtis. In February, 1894, a plea in reconvention was filed by Thomas and Curtis, alleging a conversion of their bank stock by appellant. Thereupon appellee Thompson began to demand an additional fee, and, upon appellant's refusal to accede to this demand, endeavored to extort it from appellant, notwithstanding the fact, as found by the trial court, that, when he accepted the employment, he "anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock." After appellant had refused to honor one or more unauthorized drafts drawn on it by appellee Thompson, it received the following letter from him:

"Vernon, Texas, June 27, 1894. The Southern National Bank, New York. Gentlemen: In view of the fact that you have failed and refused to pay me for services in the defense of the cross action for damages in the case of your bank *vs.* Thomas and Curtis, I have concluded to appear in this case no further; and all papers, correspondence, and the note now in my possession will be turned over to any duly-appointed attorney representing you, on payment for my services rendered thus far in defending and preparing the defense to the cross action for damages up to this time. Yours, respectfully, H. C. THOMPSON."

In a letter dated July 9, 1894, he made two propositions to appellant for his further continuance in the case upon the acceptance of either, but stating: "Otherwise I have made up my mind, finally, to withdraw." Both propositions were rejected.

The declaration quoted above was followed by conduct that was wholly irreconcilable with the confidential relation of attorney and client, as will appear from the following letters:

"Vernon, Texas, August 10, 1894. The South-

ern National Bank, New York City. Gentlemen: I telegraphed you on the 8th inst as follows: 'I will sell Curtis and Thomas note in Vernon, at public auction, for my fee, Saturday, August 18, 1894,' which I now confirm. I have also notified Thomas and Curtis of said sale. Respectfully, H. C. THOMPSON."

"Vernon, Texas, August 20, 1894. Southern National Bank N. Y.—Gentlemen: Your case is set for next week. No attorney looking after same. State National Bank busted on August 18, and will no doubt go into the hands of a receiver. The Curtis & Thomas note was sold last Saturday, 18th August, by me, and bought in by me for twenty-five dollars. On payment of my services up to date, am willing to turn you back note; otherwise, I shall proceed to sue on same in my own name. Respectfully, H. C. THOMPSON."

Thereupon appellant made Thompson a party defendant, and obtained an order of court requiring him to surrender the note declared on. Thompson reconvened for the value of his services as attorney in the case, and, strange to say, recovered $1,000, notwithstanding the Court held, and properly so, that he had, without cause, refused to comply with his contract of employment, and abandoned his client's case. This recovery was had below, and is sought to be sustained here, upon the ground that Thompson did not abandon the case till August 10, 1894, the date of a letter from him stating, "You can now come here, and look after your own interests, if you desire, in person;" and that appellant had the day before, without the knowledge of Thompson, entered into an agreement with Thomas and Curtis for a compromise of the suit, thereby preventing Thompson from doing what he had already in the most emphatic manner declared, both by word and deed,

he would not do. The bare statement of such a proposition ought to be sufficient to overturn it. The equitable principle which allows reasonable compensation for services already rendered, where the act of the client, without fault of the attorney, prevents the latter from earning his fee under the contract, cannot be applied to a case where the attorney is in fault from beginning to end, without a manifest perversion of that principle. Indeed, in this case it seems reasonably clear that the persistence of the attorney in the effort to extort a fee to which he was not entitled from a non-resident client was not without its influence in inducing such client to accept the proposition of compromise. It is, however, due said attorney to state that he appears to have acted upon a mistaken view of the scope and obligation of his contract; but against such mistake of law the Courts do not relieve.

But did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief. August 7, 1894, one M. J. Tompkins, of Vernon, wired appellant: "Thomas says will confess judgment if you will allow sixty cents for stock,"—to which appellant replied by letter and telegram on August 9, 1894, among other things, requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement, and, through other counsel employed about that time, sought to avoid it. When the agreement was made, the Court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial, the Court held appellant to the agreement, and, upon the offer of Thomas and Curtis to comply with its

terms, rendered judgment accordingly, deducting $10,800 from the sum due on the note, and giving judgment for the rest. It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We, then, have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it had been in any respect performed or acted on by the debtor. Upon the sole ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount due is denied.

We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and pre-existing status. For a succinct statement of the principle involved, see the quotation from Chitty on Contracts made by Justice Gaines in Railway Co. *vs.* Harriett, 80 Tex. 73, 15 S. W. 556, where its application, also, is illustrated. See, also, the opinion of Chief Justice Tarlton in Jennings *vs.* City of Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927. For this additional

reason, the judgment in favor of Thompson, as well as that allowing Thomas and Curtis the $10,800 credit, cannot stand. We, therefore, adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered, and in its favor, against Thompson, upon his intervention, adjudging the costs accordingly.

The plaintiff then offered in evidence the following certificate :

> *Mr. Hornblower :* I think so much of the certificate as states that Curtis and Thomas never acquiesced in the tender should go out.
>
> *The Court :* That correction may be made.

Subject to that correction the certificate was admitted and is as follows :—

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that, in the case of the Southern National Bank of New York *vs.* W. G. Curtiss and A. U. Thomas, No. 688 on the docket of the District Court of Wilbarger County, the plaintiff, on the trial of said cause, tendered into Court and to the said defendants the certificates of stock issued by the State National Bank of Vernon to W. G. Curtiss, numbered 97 and 98 respectively, the first being for one hundred and fifty shares of the capital stock of said bank, and the other for thirty shares of the capital stock of said bank, which certificates of stock were filed by the Clerk of said Court on the 8th day of August, 1895, and have ever since remained on file in said cause in said Court and are on file at this

time; that they have never been taken away by said Curtiss and Thomas or either of them, and that Curtiss and Thomas nor any one acting for them or either of them have not taken said stock away; * * * and that said stock now remains on file in said District Court of said Wilbarger County, Texas, * * * as appears of record in said cause.

Given under my hand and official signature
[SEAL.] and seal of office on this the 7th day of October, 1898.

W. B. TOWNSEND,
Clerk of the District Court
of Wilbarger Co., Texas.

The plaintiff then rested his case.

Mr. Hornblower: I hand your honor a certified copy of the decree as made by the Court of Civil Appeals.

IN THE COURT OF CIVIL APPEALS.

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH.

SOUTHERN NATL. BK. OF N. Y.	From Dist. Court, Wilbarger Co., June 27, 1896.
2411 *vs.*	
W. G. CURTIS *et al.*	Opinion by Mr. Stephens, *A. J.*

This cause came on to be heard on a transcript of the record, and the same being inspected, be-

cause it is the opinion of this Court that there was error in the judgment, it is therefore considered, and so ordered, adjudged and decreed, that the judgment of the Court below be reversed, and this Court proceeded to render such judgment as should have been rendered by the Court below. It is the order of this Court that the appellant, the Southern National Bank of New York, do have and recover of and from the appellees, W. G. Curtiss and A. U. Thomas, the sum of fifteen thousand dollars, with six per cent. interest thereon from the 20th day of January, 1893, together with all their costs in this behalf expended. And it further appearing to the Court that the said W. G. Curtis and A. U. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the note sued hereon; it is therefore ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment, as per the tender of the appellant, and that in default of such payment said stock be sold as under execution and the proceeds applied to the payment of this judgment. It is further ordered that said H. G. Thompson take nothing by his plea of intervention herein, and that the appellant, the Southern National Bank of New York, go hence without day, and it have and recover of and from said H. G. Thompson all costs occasioned by his plea of intervention, and that this decision be certified below for observance.

I, W. L. HUFF, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, hereby certify that the foregoing page contains a true and correct copy of the judgment entered by this Court in the cause of the Southern National Bank of New York *vs.* W. G.

Curtis *et al.*, on appeal from the District Court of Wilbarger County.

Witness my signature and the seal of said Court, at office in the City of Fort [SEAL.] Worth, this 18th day of April, 1898.

W. L. HUFF,
Clerk.

I, B. D. TARLTON, Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, hereby certify that the foregoing Clerk's certificate is in due form.

B. D. TARLTON,
Chief Justice.

The defendant then read in evidence the two following letters:

(Copy.)

FEB. 15th, 1894.

A. U. THOMAS, Esq.,
210½ Main Street,
Houston, Texas.

DEAR SIR:—

I beg to acknowledge the receipt of your letter of Feb. 8th, and to inform you that a copy of it will be forwarded to our counsel, Mr. H. C. Thompson, with the request that he will make known to us the proposition submitted to him by you. You can rest assured that when this is received it will have our closest attention.

We never had any disposition to oppress you. All that we wanted and now want is the money owed us by Mr. Curtiss and yourself. When that is paid under the terms of your note the collaterals will be surrendered by us. We manifested in every proper way a disposition to help you, and it was

only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at seventy five or eighty cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our Board to accept it. The litigation must necessarily be tedious, and loss must certainly come to both of us by reason of counsel fees, costs, etc.

I shall be glad to hear further from you.

Respectfully yours,

(Signed) J. D. ABRAHAMS,
Cashier.

THE SOUTHERN NATIONAL BANK
OF NEW YORK.

ISAAC ROSENWALD, President.
WALTER S. JOHNSTON, Vice-President.
J. D. ABRAHAMS, Cashier.
JOHN H. CARR, Asst. Cashier.

NEW YORK, Sept. 27th, 1894.

R. P. ELLIOT, Esq.,
Attorney at Law,
Vernon, Texas.

DEAR SIR:

I have seen our counsel and shown him your letter of the 14th. He agrees that we ought to have a copy of the amended answer setting up an alleged compromise. As soon as that comes I will show it to him and get his opinion then.

At present I may say in reply to your question "What do you want with the stock?" that we do not want the stock, and never have wanted it. We attempted to sell the stock here after default of payment of the note, as the terms of the note permitted us to do, but we virtually bid in the stock

ourselves and retained possession of it. We informed our former attorney at Vernon, and tried to impress it upon him, that we did not wish the stock and would give the debtors every benefit from it, notwithstanding the attempted sale. If we could have held the stock against the debtors, we would not have done so, and we testified to that effect in the depositions now on file in your courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the courts. If the stock turned out to be worth anything, we would get the benefit of it to the extent of our claim, and any balance would belong to the debtor.

The fact is, our counsel here thought the attempted sale did not amount to a sale, for the reason that no officer of the Bank was present with the Auctioneer, and that we simply hold the stock as collateral, as we did before the attempted sale. We were perfectly willing that the matter should so stand in the Court at Vernon. Our attorney there seemed desirous of having the stock sent on there to be foreclosed, notwithstanding the attempted sale here. We saw no use in that procedure, for if the sale here was not a sale, we had full power, under the terms of the note to make such a sale here as would be absolutely valid. We got our counsel here to prepare a brief on the subject, a copy of which was sent to our former attorney at Vernon. We have since sent a copy of it to you. You will see by the authorities there cited that we have ability to make a perfect sale of the property here without going to the expense of selling it under foreclosure proceedings in Texas. Moreover, our counsel advises us that he sees no use in making any sale of the stock at all. We

are in just as good position in holding the stock as collateral, as we would be by holding it by legal title. Upon reflection you will doubtless agree with us and our counsel here. We have not considered that we hold the stock under the alleged compromise, for no compromise was perfected.

We would like to have you tell us what you think of that defense when you send us the amended answer containing it. We will then get our counsel here to give us his opinion.

We knew nothing of the fact stated by you that Tompkins stood in with Thomas all the time. Do you think there was a conspiracy between Thomas and Tompkins to effect a compromise with us?

As to whether the stock will be assessed, will depend upon the action taken by the Comptroller of the Currency. If the Bank resumes, perhaps he will permit it to do so by reduction of capital without assessment. Nobody can form any opinion as to the probability of an assessment, until it is known what action the Comptroller will take, and whether the directors of the bank will be able to meet his terms.

Very truly yours,
(Signed) J. D. ABRAHAMS,
Cashier.

The defendant then called as a witness JESSE D. ABRAHAMS, who testified:

By Mr. Hornblower:

Q. You reside in this city? A. I do.

Q. What is your present business? A. I am the president now of the Marble Hill Quarry Company.

Q. A chartered concern? A. Chartered under the laws of New Jersey; the quarries are in Georgia.

Q. You no longer have any connection of any

kind with the Southern National Bank? A. I have not.

Q. And have not had since 1895? A. Not since March, 1895.

Q. In the years 1893 and 1894 and up to March, 1895, were you the cashier of the Southern National Bank? A. I was.

Q. And were you as cashier familiar with the transactions connected with the loan to Curtis and Thomas upon the stock of the Vernon National Bank of Texas? A. I was.

Q. That stock was put up and sold at auction in August, 1893? A. I think so. I know it was put up and sold at auction; the exact date I don't recall; I think it was August.

Q. And bid in by the Bank for the nominal sum of $20? A. Yes, sir.

Q. It was never transferred on the books of the Vernon Bank? A. Not during the time I was cashier.

Mr. Hornblower: It is averred by the complaint that it never was at any time.

Q. At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the Bank to take title adversely to the pledgors?

Objected to by Mr. Paige.

Question allowed. Exception.

Mr. Paige: The objection is that it calls for conclusions and for facts not within his knowledge.

A. No.

Q. What was the purpose of the sale? A. To make it the introduction to the suit for the amount of money which was due us.

Q I show you your letter-book. That is the letter-book of your Bank while you were cashier in February, 1893? A. Yes, sir.

Q. I show you what purports to be a copy of a letter signed by you, dated February 15, 1894, addressed to A. U. Thomas. He was one of the signers of the note, was he? A. I wrote that letter.

Q. And sent it to Mr. Thomas? A. I did.

The letter referred to is the one of that date already offered in evidence.

Q. Did Mr. B. F. Elliott represent the Southern National Bank as attorney in this matter in 1894? A. He did, sir; if I recollect, the name was R. P.

Q. Did you write a letter of instructions to him with regard to the position to be taken as to this stock? A. I wrote him several letters.

Q. I show you this letter purporting to be signed by you, dated September 27, 1894, and ask you if you signed that letter and if you sent it to Mr. Elliott? A. That is my signature; it was sent to him.

The letter is the one of that date already offered in evidence.

Q. Did your bank ever receive any dividend upon that stock? A. Never.

Q. Did your bank ever vote upon that stock? A. Never.

Cross-examination by Mr. Paige:

Q. The Vernon National Bank suspended temporarily during the Fall of 1893? A. The Vernon Bank suspended.

Q. During the Fall of 1893? A. I don't remember the date; 1893 or 1894.

Q. The bank finally failed and a receiver was appointed in August, 1894, but before that and in the Fall of 1893 the bank temporarily stopped, didn't it, and was afterwards reorganized by other parties? A. It was in the hands of the Bank Examiner.

Q. For a while? A. Yes.

Q. And was afterwards reorganized by other parties? A. I think so.

Q. Will you say that was in the Fall of 1893? A. I think it was 1893; I am not positive.

Q. Was your deposition taken as a witness in the Texas suit? A. Yes, sir; two of them, I think.

Q. Did you give this testimony in that suit upon that deposition: "The Southern National Bank of New York now has the stock so sold in its possession; said bank became the owner of said stock by purchase at said sale made by Messrs. R. V. Harnett & Co. on August 8th, 1893; Mr. F. B. T. purchased for the Southern National Bank of New York the stock so sold"? A. Yes, sir; that is my recollection.

Re-direct examination by Mr. Hornblower:

Q. Did you also testify in that deposition as follows: "In answer to the eighth cross-interrogatory propounded to him he says: Our real object in selling the stock at public auction after due notice of sale, both by publication here and due notice to the owners of the stock was to obtain for it the best possible price, and if necessary to purchase it ourselves, as we had a perfect right to do under the agreement contained in the note; the stock is to-day in our possession and we will surrender it to the owners upon receipt of amount due us, which amount is fixed by the terms of the note"? A. Yes, sir.

DEFENDANT RESTS.

The plaintiff then asked the Court to direct a verdict for the plaintiff, which the Court refused to do, and plaintiff excepted.

The Court directed a verdict for the defendant and plaintiff excepted.

The plaintiff then asked to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint, which the Court refused, and plaintiff excepted.

The plaintiff then asked to go to the jury on the issues in the action, which the Court refused, and plaintiff excepted.

In obedience to such direction of the Court the jury then rendered a verdict for the defendant and plaintiff excepted.

The foregoing bill of exceptions contains all the evidence.

The plaintiff by his counsel prays that this his bill of exceptions may be signed and sealed and it is signed and sealed accordingly.

Dec. 16, 1898.

E. HENRY LACOMBE,
U. S. Circuit Judge.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for writ of error, avers:

That in the record and proceedings in this action, and also in the matters recited and contained in the bill of exceptions and also in the giving of the verdict and judgment aforesaid, there is manifest error, in that the Judge presiding at said Circuit, against the objection of the plaintiff, made the following rulings, each of which was erroneous and to the injury of the plaintiff, to wit:

I.—In permitting the witness Abrams to answer the following questions: "At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors?"

II.—In refusing to direct a verdict for the plaintiff.

III.—In refusing to permit the plaintiff to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint herein.

IV.—In refusing to permit the plaintiff to go to the jury upon the issues in the action.

V.—In directing the jury to render a verdict for the defendant.

VI.—In that the jury, in obedience to the direction of the Court, rendered a verdict for the defendant.

Wherefore the plaintiff prays that the judgment aforesaid may be reversed.

EDWARD WINSLOW PAIGE,
Attorney for Plaintiff, being
Plaintiff in Error,

44 Cedar Street, N. Y. City.

(Endorsed): "U. S. Circuit Court, So. Dist. of N. Y.—F. Windsor Robinson, as Receiver, &c., plaintiff, against The Southern National Bank, defendant.—Assignment of Errors.—Edward Winslow Paige, attorney for Plff.-Appellant, 44 Cedar Street, New York City."

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas, Appellant.

against

THE SOUTHERN NATIONAL BANK, Respondent.

To the Southern National Bank of New York. GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Second Circuit, to be holden at the City of New York in said Circuit, on the 27th day of February next, pursuant to an appeal allowed herein and filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein F. Windsor Robinson, as Receiver, etc., is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Given under my hand at the City of New York, in the above-named district, this 31st day of January, in the year of our

Lord one thousand eight hundred and ninety-nine.

E. HENRY LACOMBE,
Circuit Judge.

[Endorsed]: "U. S. Circuit Court of Appeals, 2d Circuit—F. Windsor Robinson, as Rec'r, Plaintiff in Error, against The Southern National Bank, Defendant—Citation—Edward Winslow Paige, Attorney for Plff. in Error, 44 Cedar Street, New York City."

Sufficient service of the foregoing writ of error and citation is hereby admitted this 6th day of February, 1899.

HORNBLOWER, BYRNE, TAYLOR & MILLER,
Solicitors for Defendant Bank.

[Endorsed]: U. S. Circuit Court.
Filed Feb. 6, 1889.

JOHN A. SHIELDS,
Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the preceding pages, numbered from 2 to 93 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of F. Windsor Robinson, plaintiff in error, against The Southern National Bank of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

JOHN A. SHIELDS,
Clerk.

95 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Submitted April 28, 1899; decided May 25, 1899.

F. Windsor Robinson, as Receiver, etc., Plaintiff in Error,
vs.
The Southern National Bank of New York, Defendant in Error. } No. 148.

In error to the circuit court of the United States for the southern district of New York. Before Judges Wallace, Shipman, and Thomas.

Wallace, *Circuit Judge:*

This is a writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon a verdict by the direction of the court. The plaintiff was the receiver of the State National Bank of Vernon, Texas, which became insolvent in August, 1894, and brought this action to recover an assessment upon the stockholders of the bank made by the Comptroller of the Currency. The action was brought upon the theory that the defendant was a shareholder, and liable for the assessment, pursuant to the provisions of section 5151 of the Revised Statutes of the United States. It appeared upon the trial that in January, 1893, one Curtis was the owner of 180 shares of the capital stock of the bank, which stood in his name on the books of the bank, and for which he held the usual certificates; that on that day he pledged the shares with the defendant as collateral security for the payment of certain liabili-
96 ties, including a note for $15,000 payable four months after date; that by the terms of the pledge the defendant was authorized, upon non-payment of the note at maturity, to sell the shares at any time, without advertisement or notice to the pledgor, and to become the purchaser at the sale discharged from any equity of redemption by the pledgor; that the note was not paid at maturity, and in August, 1893, the defendant advertised the stock to be sold at auction at the public exchange in New York city, and gave eight days' notice by telegraph to the pledgor; that at the sale thus advertised the defendant bought the stock, paying for it $20 to the auctioneer, and thereupon credited the proceeds of the sale upon the note by an indorsement thereon; and that the certificates for the stock remained in the possession of the defendant from the time of the purchase until after the making of the assessment by the Comptroller of the Currency, but the stock was never transferred to the defendant upon the books of the bank.

The facts certainly would have justified a finding by the jury that the relation of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground

upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank, and remained in the name of the original owner, the defendant was not a shareholder within the meaning of section 5151. By section 5139 of the Revised Statutes the capital stock of national banks is made "transferable on the books of the association, in such manner as may be prescribed by the by-laws or articles of association." The section then declares: "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." It is the generally accepted doctrine of the courts that, notwithstanding a provision of this kind in the organic law of a corporation, the legal title to its shares
97 of stock passes as between vendor and vendee upon a transfer of the certificates accompanied by a power of attorney for their transfer upon the books, without an actual transfer upon the books. Until registration, however, the purchaser does not acquire the privileges of a stockholder of the corporation; he can compel the corporation to recognize him as a stockholder, but until he has been registered as such he has no right to vote, and dividends are payable to the stockholder of record. Is such a purchaser a shareholder within the meaning of section 5151 of the Revised Statutes, which declares that "shareholders of every national banking association" shall be individually responsible to the extent of the amount of their stock for the debts of their association? It is somewhat remarkable that in all the litigations which have been presented to the Supreme Court, involving the liability of shareholders of national banks upon assessments made by the Comptroller of the Currency, the question which is thus presented has never been distinctly decided.

In Pauly *v.* State Loan and Trust Co. (165 U. S., 619), the court had before it a case in which a pledgee who had received from his debtor a transfer of shares as collateral security for a debt, surrendered the certificate to the bank and took out new ones in which he was described as pledgor, but never was registered otherwise upon the books of the bank. In deciding as the court did, that the pledgor was not liable to an assessment as a stockholder, the cases previously adjudged by the court were elaborately reviewed, and in the opinion several rules were stated as deducible therefrom; and among them was the following: "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151." On the other hand in Richmond *v.* Irons (121 U. S., 58), in considering the question of the liability of the stockholders to an assessment under the section the court used this language:

"By section 5139 of the Revised Statutes those persons only
98 have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the

stockholder for all the purposes of the law." The proposition which has been quoted from the Pauly case was not necessary to the decision of the cause; nor was the proposition quoted from Richmond *vs.* Irons necessary to the decision of that cause. An examination of the cases cited by the Supreme Court fails to disclose one in which the owner of the shares has been held liable under the section who had never been the owner upon the books of the bank; and the cases in which the "real owner" has been held liable were those in which, being the registered owner, he has transferred his shares to another for the purpose of escaping the liability of a stockholder, or caused them to be registered in the name of an irresponsible transferee. Such was the case in National Bank *v.* Case (99 U. S., 628), where the registered owner caused the stock to be transferred to one of its clerks, who acquired no beneficial interest in it, and upon the understanding that he would transfer it at request. In Bowden *v.* Johnson (107 U. S., 251), the registered shareholder, in apprehension of the bank's failure, had transferred his stock to an irresponsible person.

It is well settled that one to whom stock has been pledged as collateral security and who has caused it to be registered upon the books of the bank in his name as owner is liable as a stockholder for the benefit of creditors, as though he were the real owner. The courts have placed his liability upon three grounds—that he is estopped from denying his liability because he has voluntarily held himself out to the public as the owner of the stock; that by taking the legal title he has released the former owner from liability; and that after having taken the apparent ownership, and become entitled to the privileges of a stockholder, it would be unreasonable to release him from the responsibilities of a stockholder. None of
99 these reasons apply in the case of one who, like the defendant, has never been a stockholder upon the books of the bank, has never held himself out as such a stockholder, has not defeated the liability as a stockholder of the pledgee, and has not enjoyed the privileges of a stockholder.

In National Park Bank of New York *v.* Harmon, the defendant became pledgee of forty shares of stock of the par value of $100 each in a national bank as collateral security for a demand loan made in November, 1891. In July, 1892, the loan not having been paid, the pledgee procured a transfer of the shares on the books of the bank to one of its employees who was irresponsible and had no interest in the transaction, in order that the latter should remain the registered owner of the shares. The bank failed in April, 1894, the shares at the time standing in the name of the pledgee's employé. This court held upon the authority of the Pauly case that the pledgee was not liable as a shareholder of the bank. Obviously he was the substantial owner of the shares, though technically the relation of pledgor and pledgee had not been terminated. The amount of the loan was nearly double the value of the shares, and the time which had elapsed denoted that the pledgor would never seek to redeem. The pledgee, by causing the transfer to be made upon the books of the bank, had discharged the liability of the pledgor

as a stockholder to the creditors of the bank. If there was no moral duty on the part of the pledgee in that case to subject himself to liability as a shareholder, there was not on the part of the defendant in the present case; and if no legal liability was incurred by the pledgee in that case, there is no reason why any should attach to the defendant in this case unless it is found in the letter of the statute. Our decision in that case was affirmed by the Supreme Court (172 U. S., 644).

The question presented is an interesting one, and we should certify it to the Supreme Court if there were any necessity for adopting that course. But as our decision is reviewable by that court, and will be reviewed, however we may dispose of the case, it seems
100 proper to decide the cause according to our convictions, and without attempting an elaborate discussion of the question. Our conclusion is that the defendant, never having been a registered shareholder of the bank, is not liable to the assessment.

The judgment is accordingly affirmed.

Edward W. Paige, for the plaintiff in error.

William B. Hornblower, for the defendant in error.

101 At a stated term of the United States circuit court of appeals in and for the second circuit held at the court-rooms, in the post-office building, in the city of New York, on the 6th day of June, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, circuit judges; Hon. E. B. Thomas, district judge.

F. Windsor Robinson, as Receiver, etc., Plaintiff in Error,
v.
Southern National Bank of New York, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.

[Endorsed:] United States circuit court of appeals, second circuit. F. Windsor Robinson, as receiver, *vs.* Southern National Bank. Order for mandate. United States circuit court of appeals, second circuit. Filed June 8, 1899. Wm. Parkin, clerk.

102 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 101, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of F. Windsor Robinson, as receiver, against Southern National Bank of N. Y., as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 7, 17, '99. W. P.]

103 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States circuit court of appeals, before you or some of you, between F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff in error, and The Southern National Bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28 day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

—— ——.

104 Allowed, and the writ being applied for by the direction of the Comptroller of the Currency of the United States, to operate as a supersedeas without bond.

Dated June 28, 1899.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

105 [Endorsed:] U. S. Supreme Court. F. Windsor Robinson, as receiver, etc., plaintiff in error, against The Southern National Bank, defendant. Writ of error. Edward Winslow Paige, attorney for pl'ff in error, 44 Cedar street, New York city. United States circuit court of appeals, second circuit. Filed Jul- 13, 1899. Wm. Parkin, clerk.

106 The President of the United States to the Southern National Bank of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 28th day of June, 1899.

—— ——.

107 [Endorsed:] U. S. Supreme Court. F. Windsor Robinson, as receiver, etc., plaintiff in error, against The Southern National Bank, defendant. Citation. Edward Winslow Paige, attorney for pl'ff in error, 44 Cedar street, New York city. Sufficient service of a copy of the within citation on the defendant, So. Nat'l Bank, is hereby admitted. Dated N. Y., June 28th, 1899. Wm. B. Hornblower, counsel for said defendant. United States circuit court of appeals, second circuit. Filed Jul- 13, 1899. Wm. Parkin, clerk.

Endorsed on cover: File No., 17,520. U. S. circuit court of appeals, 2d circuit. Term No., 406. F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff in error, *vs.* The Southern National Bank of New York. Filed September 28th, 1899.

16161

Supreme Court of the United States.

F. Windsor Robinson, as Receiver of the concerns of the State National Bank of Vernon, Texas,
Plaintiff in Error,

versus

The Southern National Bank of New York,
Defendant in Error.

October Term, 1900.

No. 137.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This cause comes before this Court on a writ of error to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment in favor of defendant in error, entered in the Circuit Court of the United States for the Southern District of New York, after a trial before the Honorable E. Henry Lacombe, Circuit Judge, and a jury. The Circuit Judge directed a verdict in favor of the defendant. The judgment of the Circuit Court was filed December 16, 1898. The judgment of affirmance by the Circuit Court of Appeals was filed June 8, 1899 (Reported, 94 Fed. R., 964). The writ of error to this Court was allowed June 28, 1899.

Statement of Facts.

This action was brought by plaintiff in error as Receiver of the State National Bank of Vernon, Texas,

against defendant in error to recover the sum of eighteen thousand dollars upon an assessment levied by the Comptroller of the Currency upon shareholders of the Vernon Bank. The assessment was at the rate of one hundred per cent. upon the par value of the capital stock, of which defendant was alleged to be the owner of one hundred and eighty shares at the time the bank was placed in the hands of the receiver by direction of the Comptroller of the Currency (Transcript of Record, pages 5 to 10).

The assessment was laid by the Comptroller under the authority of the National Banking Act, now a part of the Revised Statutes.

Section 5151 thereof is, so far as material to this cause, as follows:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Section 5234 authorizes the Comptroller to appoint a receiver of a national bank under certain conditions, who may, under the direction of the Comptroller, "if necessary to pay the debts of such association," enforce the individual liability of the stockholder.

The following facts are alleged in the complaint and either admitted or not denied by defendant, wherefore they may be accepted as true:

The State National Bank of Vernon was organized under the laws of the United States.

Plaintiff in error was appointed, by the Comptroller of the Currency, receiver of the bank September 24, 1894.

The Comptroller made an assessment upon the capital stock *and the owners of the same*, equal to the par value of the stock, February 1, 1895.

One Curtis was on January 20, 1893, the owner of one hundred and eighty shares of the stock of the bank

and was registered as owner thereof on the bank's books.

On that day Curtis and one Thomas gave to the Southern National Bank of New York, the defendant in error, their promissory note for the sum of $15,000, depositing with said bank the said one hundred and eighty shares of stock of the Texas bank, evidenced by certificates numbers 97 and 98, the market value of which on said date was $18,000. The said note in terms reserved to the Southern National Bank the right to sell the said stock in case of default of the promisors, at public or private sale without advertisement or notice to the promisors, " WITH THE RIGHT *on the part of said Bank* TO BECOME PURCHASER *thereof, at said sale or sales, freed and discharged from any equity or redemption,*" any overplus of the proceeds after the amount due on the note should have first been applied to its payment, etc., to be returned to promisors.

The said certificates of stock were delivered to the Southern National Bank, endorsed by Curtis in blank, with power of attorney on the back of each certificate executed in blank by Curtis.

Transcript of Record, p. 8.

Default occurred in the payment of the note and on the first day of August, 1893, the Southern National Bank advertised the stock to be sold at public auction August 8, 1893. It also expressly notified the promisors of the date of sale.

The stock was struck off at the sale to defendant upon its bid of twenty dollars. Defendant paid to the auctioneer the said sum of twenty dollars and received back the same less the auctioneer's fee. The certificates of the stock were thereupon delivered to defendant by the auctioneer.

Transcript of Record, page 19.

Defendant in error retained the stock in its possession from the time when it purchased it at the auction sale, August 8, 1893, until after the Comptroller made

the assessment above referred to, and, as far as appears from the record, has never parted with the same.

The stock was never transferred upon the books of the Texas bank to defendant in error, but remained thereon in the name of Curtis.

The Texas bank suspended July, 1893, and remained in the hands of the United States bank examiner until September 14, 1893, when it resumed business and continued therein until finally closed August 18, 1894.

See Complaint and Answer.
Transcript of Record, pages 5 to 13.

Evidence was introduced by plaintiff in error, consisting in part of the judgment roll or record of a suit tried in Texas between defendant in error as plaintiff and Curtis and Thomas as defendants, wherein defendant in error sued to recover the amount due on the said note *less the said sum of twenty dollars, the proceeds of the said auction sale.* The original petition in that suit was filed August 10, 1893.

Transcript of Record, pages 21, 23.

Several amended petitions were thereafter filed and judgment was finally rendered in defendant's favor for a part of the claimed amount. The Civil Court of Errors of Texas reversed the judgment on the appeal of The Southern National Bank and directed judgment in its favor for the full amount claimed, decreeing the stock to Curtis and Thomas on payment of the judgment. It does not appear that the judgment has ever been paid, or the stock delivered to Curtis.

Transcript of Record, pp. 79, 81.

Assignments of Error relied upon by plaintiff in error.

That the learned trial Court erred:

I.—In permitting the witness Abrams to answer the following questions:

> "At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors."

II.—In refusing to direct a verdict for the plaintiff.

III.—In refusing to permit the plaintiff to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint herein.

IV.—In directing a verdict for the defendant.

ARGUMENT.

I.

The learned trial Court erred in permitting defendant to produce testimony as to its intention in buying the stock at public auction thereof. The sale and bid were unconditional and absolute. The fact of the purchase spoke for itself.

The testimony referred to in the first assignment of error and in the point is the following (Transcript of Record, p. 86):

> "Q. (By Mr. Hornblower, counsel for defendant.) At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors?
>
> Objected to by Mr. Paige (counsel for plaintiff).
>
> Question Allowed. Exception.
>
> Mr. Paige: The objection is that it calls for conclusions and for facts not within his knowledge.
>
> A. No."

The person who gave this testimony was the cashier of The Southern National Bank in 1893, 1894 and part of 1895. What were his duties as cashier is not stated.

We submit that on the face of the question a conclusion and not a fact was called for. It is not necessary to cite authorities in support of the elementary principle that witnesses, other than experts, are not to be permitted, over objection, to state conclusions; they are to state facts and the jury is to draw conclusions therefrom.

No foundation was laid whereon might be predicated the knowledge of the witness, merely the cashier, as

to what the intention of the bank was. But the intention was in any event immaterial. *Why* a man buys a chattel at an absolute sale does not limit the title he acquires thereby. The fact that he buys it without *at the time* signifying to the world his reasons for doing so, or qualifying his bid, would justify any one in looking upon him thereafter, until he parted with it, as the absolute owner thereof.

> "An absolute sale is one made and completed without any condition whatever."
>
> 2 Bouvier's Law Dict., 943.
>
> Tarling *v.* Baxter, 6 B. & C., 360.

Buying at auction is a well-recognized method of acquiring title to a chattel. The law looks at what is done, not at what may be in the mind of the purchaser, but not communicated to the world.

In this case the auctioneer called for bids for the stock; only one was made, apparently, and there is nothing to show that it was conditional, or that any notice of intention merely to protect the purchaser's rights was given at the time. A mere mental reservation on the purchaser's part is not notice of condition. It nowhere appears that defendant stated to the auctioneer, or to anyone else until after the sale, after it had paid the purchase price and after it had received the stock from the auctioneer, assigned in blank and with blank power of attorney thereon, that it bought the stock merely to protect its rights, or as agent for Curtis and Thomas. It was an unconditional sale at auction, so far as appears, and defendant's bid was unconditional. Defendant, therefore, became the actual owner of the stock, endowed with all rights and subject to all liabilities as such owner. It stood in the shoes of the former owner, who had assigned the stock to it with power and authority to sell and become the owner thereof. It is absurd for the defendant to seek to evade its liability as owner in view of what took place at the sale—not afterwards, but *then*.

> "The very appropriation of the chattel is equiva-

> lent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."
>
> Dixon *v.* Yates, 5 B. & Ad., 313, 340.

The case of McComb *v.* Wright, 4 Johns. Ch. (N. Y.) 659, decided by Chancellor KENT, is exactly in point. There defendant sought to avoid liability as purchaser at public auction of a piece of land on the ground that he had purchased not for himself but as agent for one Thompson. The auction sale was of the usual character; the terms of sale were well understood before the sale; the defendant never made any objection or pretended to any misunderstanding on that point; the sale was conducted in the usual manner; the defendant bid for the lot the price at which it was struck off to him. Further facts appear in the following extract from the Chancellor's opinion:

> "2. But it is further objected, that the defendant purchased as the agent of one Jeremiah Johnson. * * * The answer to this is, that the defendant purchased as principal, and did not disclose to the plaintiffs, nor to the auctioneers, either at the sale, or on the next day, when he paid the deposit money, that he acted in the character of agent of Thompson. The contract was made with him, as principal, and he cannot withdraw himself afterwards from responsibility as such. To admit a party to do this, would lead to all kind of evasion, abuse and fraud."

The following may also be quoted from the headnote prefixed to the report of the case:

> "An auctioneer is an agent lawfully authorized by the purchaser, either of lands or goods, at auction, to sign the contract of sale for him, as the highest bidder; and writing his name, as the highest bidder, in the memorandum of sale, by the auctioneer, immediately on receiving his bid and knocking down the hammer, is a sufficient signing of the con-

tract within the Statute of Frauds, so as to bind the purchaser."

In the face of the over-shadowing fact that defendant bought the stock at public auction without reservation, or notice of any condition attached to his bid or purchase, the testimony of the cashier as to the intention of the bank in making the bid ought not to have been admitted. It called for a conclusion although no ground had been laid for the formation of one. No facts had been testified to which showed the witness' knowledge of the intention, nor any facts from which he could conclude what the intention was.

II.

When the auctioneer struck off the stock to defendant, and the latter had paid the price bid and the auctioneer's fees, and had received from him the certificates for the stock, it became the real owner thereof in the place of Curtis, who thereupon ceased to be the owner. The shareholder's liability under Section 5151 instantly attached to defendant's ownership of the stock.

This point is based upon assignments of error numbers II, III and V. They arise from the refusal of the Court to direct a verdict in favor of plaintiff in error, or to permit the case to go to the jury upon the question of the real ownership of the stock, and upon the direction of a verdict in favor of defendant in error. By his ruling the learned trial Court held, in effect, that as a matter of law the ownership of the stock by defendant in error was not of such a nature as to cause a shareholder's liability to attach to it, because the stock was never

transferred upon the books of the Vernon Bank to the name of defendant in error. This point was strenuously urged by the learned counsel for defendant in error upon the Circuit Court of Appeals in his brief. The learned Circuit Judge writing the opinion there states:

> "The *only ground* upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank, and remained in the name of the original owner, the defendant was not a shareholder within the meaning of Section 5151."
>
> Transcript of Record, p. 96.

It may be assumed, therefore, that the decision of the Circuit Court would have been reversed but for the opinion of the Circuit Court of Appeals that the defendant in error was not the real owner of the stock since it was not the registered owner thereof. The Court admitted that the jury would have been justified in finding that defendant in error became the owner outright of the stock upon the purchase at the public sale. So our point with respect to the passing of the title thereto out of Curtis and into defendant in error may be assumed to have been conceded by the Court below. Therefore we shall address ourselves to the question whether or not the neglect of defendant in error to become the registered owner of the stock has properly enabled it thus far to escape its share of the burden which the National Banking Act has placed upon shareholders for the benefit of creditors of insolvent national banks. Our contention is that it is liable upon the assessment as the real owner of the stock for the full amount claimed by the receiver.

We may premise our argument on this point by stating that the National Banking Act was designed to place the business of banking upon a safe and sound basis. It is unnecessary to examine all its provisions and the decisions of this Court thereon for the purpose of pointing out how far this object has been attained; but it is clear that the provisions of Section 5151 were designed to

furnish a fund wherewith to pay creditors so far as possible in case the assets of the bank should prove insufficient. The rights of creditors of national banks have, under the act, been ever the subject of most jealous care by all the Courts.

This Court has held that the liability of stockholders prescribed by this section is of a contractual nature; that upon becoming shareholders the liability *eo instante* attaches to their stock. By holding themselves out as stockholders they may be deemed to encourage third persons to rely upon their reputation and ability and thus to become creditors of the institution, and therefore they ought not to be permitted to escape responsibility.

Matteson *v.* Dent, 176 U. S., 521, 525.
Richmond *v.* Irons, 121 U. S., 27, 55.
Bowden *v.* Johnson, 107 U. S., 251.
Pauly *v.* State Loan, &c., Co., 165 U. S., 619.
Concord *v.* Hawkins, 174 U. S., 364.

In the Pauly case Mr. Justice HARLAN, writing for the Court, examined a great many decisions with the view, in part, of showing how this Court had construed the banking act to intend that the real owner of the stock is the person to whom the liability attaches. His examination of the cases was summed up in part as follows:

> "That *the real owner* of the shares of the capital stock of a national banking association may, *in every case,* be treated as a shareholder within the meaning of Section 5151."

The learned Circuit Court of Appeals seem to have considered this as a mere dictum, or as not decisive of the point at issue. The learned counsel for defendant in error in his brief below sought to distinguish the Pauly case from that of Richmond *v.* Irons, 121 U. S., 58, and others, thereby endeavoring to show that it laid down no new rule and that it did not alter what he claimed to be the true rule, namely, that only shareholders of record are subject to the statutory liability.

The line of cases, of which Stuart *v.* Hayden, 169 U. S., 1, is perhaps the latest example, holding that one who seeks to escape this liability by having the stock transferred to the name of an irresponsible person is nevertheless subject to the liability, was passed over with the briefest possible reference. No mention was made of many cases like National Bank *v.* Case, 99 U. S., 628, wherein pledgees or trustees were held liable as the real owners because they had failed to have the word "pledgee" or "trustee" added to their names in the certificates of stock, or on the books. It was not clearly pointed out to the learned Circuit Court of Appeals that this Court has frequently held the real owner, whose name did not appear on the stock books as owner, liable for an assessment similar to that in the case at bar.

There are numerous cases, decided before the Pauly case, which have settled the law to the effect that Section 5151 looks to the real owner not alone to the registered owner; that the assessment *may* be recovered of the registered owner, or it *may* be recovered of the real owner. In other words, the receiver is not confined to an action against the registered owner, but may sue the real owner if he appear more responsible than the former. These decisions must be presumed to have been, as they undoubtedly were, in the mind of Mr. Justice HARLAN when writing the opinion in the Pauly case. Therefore, while the words quoted may have been in the nature of a dictum in that particular case, they nevertheless embodied a sound and well-established rule.

The attention of the Court must be especially called to the fact that when Curtis deposited the 180 shares with the defendant in error as collateral security, he assigned the certificates therefor in blank, and also executed in blank a power of attorney. This is admitted by defendant in error by stipulation.

Transcript of Record, p. 8.

Thus defendant could at any time have had the stock transferred to it as pledgee upon the stock book

of the bank and so have protected itself against liability.

Curtis had done everything he could have been asked to do in order to divest himself of ownership of or control over the stock in case of his default upon the note payment of which it was pledged to secure. We therefore claim that when defendant bought the stock at the public auction thereof, it ceased to hold the same as pledgee, so far as all the world particularly the creditors of the bank, were concerned. How it held the stock thereafter so far as Curtis, the registered owner, is concerned, affects only Curtis and itself and is entirely immaterial in this action by the representative of the creditors to enforce their rights against it as the real owner. It became the real owner *by the express authority of Curtis*, as a matter of law as well as in fact.

The first case directly in point is that of Whitney *v.* Butler, 118 U. S., 655. In that case A, an owner of . onal bank shares, employed an auctioneer to sell them at public auction. B bid for them and they were knocked down to him. He received from the auctioneer a certificate for the shares, with a power of attorney duly executed in blank. The purchase money was paid by the auctioneer to A. B was employed by the president of the bank to make this purchase for a customer of the bank who had made a deposit for the purpose. No formal transfer of the stock was ever made on the transfer book. After the bank failed, the receiver began an action against A to recover the amount of the assessment upon the stock. It was held that A's responsibility ended as soon as he surrendered his stock to the bank and delivered to the bank's president the certificate with power of attorney sufficient to effect a transfer of the stock on the bank's books.

Mr. Justice HARLAN, who wrote the opinion, said in part:

> "Through their" (the defendants') "agents, the brokers, who sold the stock, and through whom they received the money paid for it, they surrendered the certificates and power of attorney to the presi-

dent of the bank, he receiving them, with knowledge not only that defendants had parted with all title to the stock and had been paid for it, but, also, that it had been purchased at public auction by Eager. * * * The right to have the transfer" (on the books) "made, and thereby secure exemption from further responsibility, was secured to the defendants both by the statute and by the by-laws of the bank. They did all that was required by either as a preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books."

We submit that the foregoing is precisely in point. By the terms of Curtis' note, the defendant was at liberty to sell the stock without notice on default by Curtis. Such sale could be public or private; the defendant had the right to become the purchaser of the stock *"freed and discharged from any equity or redemption."* Language could not be less ambiguous. What happened? Curtis and Thomas defaulted in payment of the note. After notice (which was unnecessary) the defendant caused the stock to be sold at public sale and it was struck off to defendant, who received not only as seller the purchase price less the auctioneer's fees, but also as purchaser the certificates of the stock duly assigned in blank by Curtis with power of attorney properly executed. Curtis, therefore, plainly ceased to be the owner of the stock, or liable to the receiver for an assessment thereon. Clearly, under the Whitney case, the purchase thereof by defendant, showing the latter to have become the owner, would have been a good defense to an action against Curtis by the receiver to recover the assessment on the stock. He could have done nothing more than he did to divest himself of all title to the stock.

In the case of Matteson *v.* Dent, 176 U. S., 521, the exceptions to the general rule,—that the registered owner of the stock of a national bank remains liable for an assessment thereon, are stated, the Whitney case being cited with approval.

Davis *v.* Stevens, 17 Blatch., 259, Fed. Cases No.

3,653, is also directly in point. It was decided in 1879 by the Circuit Court, Southern District of New York, the late Mr. Chief Justice WAITE writing the opinion as Circuit Justice.

That was a suit by a receiver of a failed national bank to recover an assessment upon the bank's stock. The bank failed December 12, 1871. The defendant Stevens had not been a registered shareholder since October 29, 1870, when he caused to be transferred one hundred and seventeen shares of the stock to an irresponsible person, one Elston. There was at the time no suspicion of the bank's insolvency. Subsequently Stevens bought more of the stock and sometimes made sales, but caused the certificates to be made to Elston. On November 22, 1871, one hundred and sixty-one shares of the stock stood in Elston's name on the bank's books, but it did not appear that any of the stock originally in Stevens' name was included in the certificate for these one hundred and sixty-three shares. This certificate was delivered to Stevens as Elston's agent. The trial Court directed a verdict for defendant. Mr. Justice WAITE said in part:

> "For all the purposes of this inquiry it must be assumed, that, as between Stevens and Elston, Stevens was the real owner of the stock. Clearly, the evidence tended to prove that fact, and there was enough to make it wrong to take the question from the jury. There is no pretense that Elston did not give his assent to the transfer to him on the books. This made him liable as a shareholder. * * * The point to be decided now is whether, in an action at law, by a receiver of the bank, the real owner of stock in a national bank, standing, by his procurement, in the name of another, and never having been in his own name on the books, can be charged, as a shareholder, with the statutory liability for debts."

After citing sections of the statute, including section 5151, and saying that Elston, as the registered owner, could be held liable for the assessment, the learned Chief Justice considered the question as to

whether Stevens, the real owner, might not also be held liable. His conclusion was as follows:

> "I cannot reach any other conclusion than that Stevens, the decedent, was, in law, a 'shareholder' of the bank at the time of its failure, and, as such, liable in this action."

Judgment reversed and new trial ordered.

Not only is this case directly in point upon the question whether or not the receiver can maintain this action in spite of the fact that the defendant, the real owner of the stock, is not also the registered owner thereof, but it also is authority for the proposition that the learned trial Court, in any event, should have submitted to the jury the question whether defendant did become the real owner if he was in doubt as to whether, as a matter of law, defendant became the owner upon having the stock struck off to it on the sale.

The Davis case has been referred to by this Court with approval more than once, notably in the case of Bowden *v.* Johnson, 107 U. S., 262. That the opinion is that of the late Chief Justice is a fact of itself sufficient to entitle it to the highest respect.

There is the further consideration that defendant in error might have been compelled in equity to transfer the stock on the books of the bank to its name and to pay all calls on it after the transfer.

Upton *v.* Davis, 91 U. S., 65, 72.

The case of Davis *v.* Stevens was followed in Case *v.* Small, 10 Fed. R., 722. There PARDEE, C. J., said in part:

> "Those persons who hold themselves or allow themselves to be held out as owners of the stock, are liable whether they own stock or not."

Snyder *v.* Foster, 73 Fed. Rep., 136, was a case where S. had sold stock to C., cashier of a bank. No transfer of the stock was ever made on the books of the bank. The receiver sued S. for the amount of an assessment, the bank having failed. Judgment in favor of the

receiver was reversed on the ground that S. was no longer liable as he had done all he was bound to do to divest himself of ownership of the stock.

The case of Young *v.* McKay, 50 Fed. Rep., 394, was one where a stockholder, a year before the bank failed, sold his stock through a broker and endorsed the certificate. The broker acted in the transaction as an undisclosed principal. The cashier of the bank promised to have the stock transferred on the books of the bank, but failed to do so. The receiver sued the original shareholder, his name appearing on the books as the owner of the stock. Judge HAWLEY followed the rule laid down in Whitney *v.* Butler, *supra*, and held that defendant, having done all that a reasonable and prudent man could be asked to do in order to divest himself of the ownership of the stock, was not liable for the assessment.

Coming to the cases decided since the Pauly case, we find that of Houghton *v.* Hubbell, 91 Fed. R., 453, decided by the Circuit Court of Appeals, First Circuit. There the Court said in part:

> "The fact that the record holders may be held does not, necessarily, mean that the actual holders may not be held. The general finding established the fact that the defendant below was the real owner of the stock at the time the bank suspended, and when the assessment was made by the Comptroller. While there is, perhaps, no express Supreme Court authority to that effect in a case exactly in point, the various expressions in the following authorities indicate clearly enough the understanding of the Supreme Court that the real owner may properly be assessed and held: Anderson *v.* Warehouse Co., 111 U. S., 479, 483; Pauly *v.* Trust Co., 165 U. S., 606, 619, 623; Welles *v.* Larabee, 36 Fed. R., 866, 868; Davis *v.* Stevens, 17 Blatchf., 259. * * * It is according to principle that a burden of this character should rest upon the actual owner, and, as a general rule, there is no safer party to pursue than the actual responsible owner on whom the ultimate liability must rest."

The Court held further that the Comptroller might

properly, in his discretion, elect to pursue directly the actual known owner.

Earle v. Coyle, 95 Fed. R., 99, was a case where stock was sold at public auction. It was bought there by the cashier of the bank who neglected for four years to have it transferred on the books to his name. The seller was held not liable for an assessment on the stock, although he was the registered owner thereof at the time the bank failed.

We would also respectfully refer the Court to notes on the question of the liability of shareholders in national banks which will be found appended to the reports of the cases of Beal *v.* Essex Savings Bank, 15 C. C. A., 128, 130; Rickerson Rolling Mill *v.* Farrell Foundry, 23 C. C. A., 315; Scott *v.* Latimer, 33 C. C. A., 23.

In his brief below, the learned counsel for defendant in error sought to maintain that Richmond *v.* Irons, 121 U. S., 27, was an authority for the proposition that only the registered owner—except in cases of purely colorable transfers—could be held liable under Section 5151. In the cases of Young *v.* McKay and Snyder *v.* Foster, *supra*, the decisions in the Richmond and Whitney cases are ably examined and distinguished. There is no difference in principle between them, but each was dealing with a different state of facts. The facts in the case at bar are closely analogous to those in the Whitney case, but quite unlike those in the Richmond case. Wherefore we maintain that the former is a direct authority to be applied to the case at bar. There are too many exceptions to the general rule that only the registered owner is liable for an assessment to permit of the application thereof to every and any state of facts.

III.

The judgments of the Courts below should be reversed and the cause remanded with direction to direct judgment in favor of plaintiff in error, or for a new trial.

Dated November 16, 1900.

Respectfully submitted,

CHASE MELLEN,

Of Counsel for Plaintiff in Error.

16172

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 137.

F. WINDSOR ROBINSON, as Receiver, &c.,
Plaintiff in Error,

AGAINST

THE SOUTHERN NATIONAL BANK OF NEW YORK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This cause comes before this Court on a writ of error on behalf of the plaintiff to review a judgment rendered in the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment in favor of defendant rendered in the Circuit Court of the United States for the Southern District of New York after a trial before his Honor Judge LACOMBE and a jury. A verdict was directed on the trial in favor of the defendant.

The opinion of the U. S. Circuit Court of Appeals is reported 94 Fed. Rep., 22.

Facts.

This is an action at law, brought by the plaintiff, as Receiver of the State National Bank of Vernon, Texas, to recover the sum of $18,000 and interest upon an alleged liability of the defendant The Southern National Bank of New York as a stockholder of the State National Bank of Vernon, Texas, for the debts of that bank.

There was no dispute upon the trial as to the facts.

The complaint sets forth and the answer admits the following facts :

The State National Bank of Vernon, Texas, is a national banking association organized under the laws of the United States. On the 20th of January, 1893, one W. G. Curtis was the owner of 180 shares of the capital stock of the State National Bank, of the par value of $100 each, which stood in his name on the books of the bank, and for which he held the usual certificates. On that day one A. U. Thomas and the said Curtis gave their promissory note for value to the defendant The Southern National Bank for $15,000, payable four months after date. The note recited that the makers of the note had "deposited with said bank, as collateral security for payment of this or any other liability or liabilities of ours to said bank now due or to become due, or that may be hereafter contracted, the following property, viz.: One hundred and Eighty (180) shares of the capital stock of the State National Bank of Vernon, as evidenced by Ctf. No. 97, 150 shs., Ctf. No. 98, 30 shs., the market value of which is now $18,000."

The note also gave the powers usually contained in a stock note in case of default in payment to sell the securities at public or private sale, with the right on the part of the bank to become the purchaser thereof at such sale. The note was not paid when due (see pp. 5 to 13 of Record).

The following facts were stipulated and agreed on the trial :

On the 1st of August, 1893, the defendant notified Curtis and Thomas by telegraph that the stock would be sold on the 8th of August, 1893. On the 7th of August, 1893, it advertised in the New York papers, where such things are usually advertised, that the stock would be sold at noon on the 8th of August, 1893. On the 8th day of August, 1893, at noon at the Public Exchange in New York the stock was put up for sale at public auction and was struck off to the defendant for the sum of $20, the defendant being the highest bidder and that being the highest sum bid for it. The defendant then paid the auctioneer the $20 and afterwards received back from him that sum less his fees. That was the place where and the way in which sales of collateral to such notes were then made in New York.

These facts were admitted "without prejudice to the right of either party upon the trial to introduce oral proof as to the terms and circumstances of the sale, and without prejudice to defendant's claims as to the legal effect of the said purchase and sale" (pp. 18, 19).

It is alleged in the complaint and admitted in the answer and was proved on the trial that *the certificates for the stock "have not been transferred upon the books of the Bank of Vernon, Texas"* (pp. 9, 12, and 86 of Record).

The former cashier of the Southern National Bank, Mr. Abrahams, was called as a witness for the defendant upon the trial, and testified that he was the cashier of The Southern National Bank, the defendant, in the years 1893, 1894, and up to March, 1895, and as cashier was familiar with the transactions connected with the loan to Curtis and Thomas upon the stock of the Vernon National Bank of Texas. He further testified that at the time of the sale of the collateral, and at the time of the nominal purchase for $20, it was not the intention of the officers of the bank to take title adversely to the pledgors, the purpose of the sale being

to make it the introduction to the suit for the loan of money due the bank (p. 86). *The defendant never received any dividend upon the stock, and never voted upon the stock* (p. 87).

The State National Bank of Vernon suspended on or before the 21st day of July, 1893, and was in possession of the United States Bank Examiner until September, 1893, when it was opened for business, and continued to transact business as usual until the 18th of August, 1894, when it finally closed, and the plaintiff was subsequently appointed Receiver (p. 9 of the Record).

On the 15th of February, 1894, a letter was written by Mr. Abrahams, as cashier of the defendant bank, to A. U. Thomas, one of the makers of the note, in which he says:

"We never had any disposition to oppress you. *All that we wanted and now want is the money owed us by Mr. Curtis and yourself. When that is paid under the terms of your note the collaterals will be surrendered by us.* We manifested in every proper way a disposition to help you, and it was only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at 75 or 80 cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our Board to accept it" (pp. 82, 83).

At the time this letter was written the State National Bank of Vernon was carrying on business (see Paragraph V. of Complaint, at p. 9).

Again on September 27, 1894, Mr. Abrahams, the cashier of the bank, wrote to R. P. Elliot, of Vernon, the attorney of The Southern National Bank, as follows:

"At present I may say in reply to your question 'What do you want with the stock?' that *we do not want the stock and never have wanted it.* We attempted to sell the stock here after default of payment of the

note, as the terms of the note permitted us to do, but we virtually bid in the stock ourselves and retained possession of it. *We informed our former attorney at Vernon and tried to impress it upon him that we did not wish the stock and would give the debtors every benefit from it notwithstanding the attempted sale. If we could have held the stock against the debtors we would not have done so,* and we testified to that effect in the depositions now on file in your Courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the Courts. If the stock turned out to be worth anything we would get the benefit of it to the extent of our claim and any balance would belong to the debtor. The fact is our counsel here thought the attempted sale did not amount to a sale for the reason that no officer of the Bank was present with the Auctioneer and that *we simply hold the stock as collateral, as we did before the attempted sale.* We were perfectly willing that the matter should so stand in the Court at Vernon " (Record, pp. 83, 84).

The references in this letter to the proceedings in Court at Vernon related to a suit which had been brought by the Southern National Bank in the District Court of Wilbarger County, Texas, against Curtis and Thomas as makers of the note to recover the amount of the note less the nominal amount for which the collateral was bid in on the attempted sale. In the petition originally filed in that suit The Southern National Bank, through its attorney, averred that the net proceeds, amounting to $12, had been allowed as a credit on the note, and sued for the balance ; but in the shape that the case finally took The Southern National Bank expressly disclaimed any title to the note as it did in its correspondence, and took the position that the note was only held as collateral security. Mr. Abrahams, the cashier of The Southern National Bank, gave testimony by deposition in the Texas suit,

in the course of which he testified to the facts of the sale, and further testified:

"Our real object in selling the stock at public auction after due notice of sale, both by publication here and due notice to the owners of the stock, was to obtain for it the best possible price, and if necessary to purchase it ourselves, as we had a perfect right to do under the agreement contained in the note; the stock is to-day in our possession, and *we will surrender it to the owners upon receipt of amount due us*, which amount is fixed by the terms of the note" (p. 88).

The suit in Texas became very complicated by reason of the defense of an alleged compromise, and also by reason of a controversy with a former attorney of The Southern National Bank (one Thompson), who claimed title on his own behalf to the note.

The makers of the note took the position, by their pleading in the Texas Court, *that the sale of the stock was wrongful and void* (pp. 41 to 45).

The Southern National Bank by its third amended petition in that suit, set forth that the credit of $12 endorsed on the note was improper and incorrect, as the bank "*does not claim any right or title to said bank-stock* by reason of any attempted or pretended sale of same, but that plaintiff *now holds said bank stock as collateral security only*, as it has heretofore done, as fully stated in the said note sued on herein. That the said bank stock has at all times since the execution and delivery of the note sued on herein, been in the possession and under the control of the plaintiff, and plaintiff has always been ready and willing at any and all times, and is now ready and willing to return to defendants the said bank stock upon the payment by them of the said note here sued on by it and the plaintiff here now tenders in open Court to the said defendants the said bank stock upon the payment by them of the said note aforesaid" (p. 37).

It appears by the certificate of the Clerk of the District Court of Wilbarger County, Texas, dated

October 7, 1898, *introduced in evidence by the plaintiff in this suit*, that on the trial of the Texas suit the plaintiff The Southern National Bank of New York tendered into court and to the defendants Curtis and Thomas the certificates of stock in question, " which certificates of stock were filed by the Clerk of said Court on the 8th day of August, 1895, and have ever since remained on file in said cause in said Court and are on file at this time " (pp. 79, 80). The trial Court in that suit found the facts as to the making of the note and the depositing of the collateral security, and as to the sale of the collateral. It also found that there had been a settlement as between the plaintiff and Curtis and Thomas by allowing them sixty cents on the dollar for the bank stock. The Court, therefore, gave judgment for the plaintiff on the basis of the compromise for $5,751 and interest instead of the full amount of the note. It also found in favor of Thompson for $1,000 on his claim against the plaintiff (see pp. 59, 60). An appeal was taken to the Civil Court of Appeals of Texas, which Court held that there was no accord and satisfaction, and therefore, no valid compromise, and that plaintiff was entitled to judgment for the full amount of the note as against Thomas and Curtis. It also held that Thompson had no valid claim against the plaintiff (pp. 74 to 79). In the opinion of the Court of Appeals it is said :

" *Appellant tendered the stock in Court for Thomas and Curtis, thereby waiving its right as purchaser thereof* " (p. 78),

and after stating the conclusions of the Court the opinion states :

" We, therefore, adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here *render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered* and in its favor against Thompson upon his intervention, adjudging the costs accordingly " (pp. 78, 79).

The judgment entered on the decision of the Court of Civil Appeals directed that The Southern National Bank recover from Curtis & Thomas the sum of $15,000, with six per cent. interest from the 20th of January, 1893, with costs, and it was further *ordered that the 180 shares of stock of the State National Bank of Vernon " be turned over to them [that is, Curtis & Thomas] upon payment of this judgment, as per the tender of the appellant"* (p. 81).

Upon the foregoing proof Judge LACOMBE directed a verdict for the defendant in this suit, to which direction plaintiff excepted.

The judgment entered on this verdict was affirmed on writ of error by the Circuit Court of Appeals, Judge WALLACE writing the opinion and Judges SHIPMAN and THOMAS concurring (94 Fed. Rep., 964).

POINTS.

In our discussion of the points involved in this case we shall reverse the order in which the points are discussed in the brief for plaintiff in error.

The first assignment of error, and the one discussed in Point I. of the brief for plaintiff in error, relates to a matter of evidence; namely, to an exception taken to a question put to the witness Abrahams, a former cashier of the Southern National Bank, as to the intention of the officers of the bank at the time of the nominal purchase of the collateral. If we are right in our contention that only the registered holder of stock is liable under the statute, then this exception becomes wholly immaterial, and its discussion becomes unnecessary, as the admission of the question, even if erroneous, could not have in any way harmed the plaintiff

in error. We shall, therefore, pursue what seems to us the more logical order of argument, and shall discuss in turn the following propositions:

I.

The defendant in error, never having been a registered shareholder by a transfer of the stock on the books of the State National Bank of Vernon, is not liable, as a shareholder, for the debts of the bank.

II.

Even if, under any circumstances, one who has never been a shareholder of record can be held liable as the "real owner" of the stock, yet the undisputed testimony showed that the defendant in error was not, in any proper sense, the "real owner" of the stock.

III.

The first assignment of error, with regard to the question asked the witness Abrahams, is not well taken.

IV.

There was no disputed question of fact to go to the jury; the evidence was uncontradicted, and the trial Judge was justified in directing a verdict for the defendant on the ground that on the undisputed evidence the defendant was not the "real owner" of the stock.

V.

To hold the defendant in error liable, by reason of any technical or theoretical ownership resulting from the nominal sale of the collateral security, would be to subvert the rule laid down by this Court so as to work gross injustice and hardship in the case at bar.

I.

The defendant in error, never having been a registered shareholder by a transfer of the stock on the books of the State National Bank of Vernon, is not liable as a shareholder for the debts of the bank.

(a) Counsel for plaintiff in error claims that whatever may have been the rule prior to the decision in *Pauly vs. State Loan and Trust Co.*, 165 U. S., 606, that decision has established the proposition that in all cases the "real owner" is liable as a shareholder, whether he is or has ever been a shareholder of record.

We claim that the decision in the *Pauly* case was not intended to overrule the previous decisions to the effect that only stockholders of record are liable for the debts of the bank, and that the point of the opinion and the effect of the decision in the *Pauly* case was to exonerate one who was a stockholder of record, and not to charge one who was not and never had been a stockholder of record. What the *Pauly* case decided and all that it decided, was that where stock was transferred to the name of a pledgee, and the word pledgee appeared on the books of the bank, it thus *appeared of record* that the transferee was not the "real owner" of the stock, and the transferor still remained liable. Any language used by the Court implying any broader proposition than this is purely *obiter*, and must be interpreted in the light of the facts then before the Court and in the light of the prior and subsequent decisions of this Court.

The decision of the Court relieved a registered stockholder from liability; it did not charge a non-registered stockholder with liability.

(b) The statutory liability is imposed by Section

5151 of the U. S. Revised Statutes, which reads as follows:

"The *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The term "shareholder" is defined by Section 5139, as follows:

"The capital stock of each association shall be * * * *transferable on the books of the association.* * * * Every person *becoming a shareholder by such transfer shall*, in proportion to his shares, *succeed to all the* rights and *liabilities of the prior holder* of such shares."

The statute thus clearly limits the liability of persons as shareholders to those who have become shareholders of record.

(c) The rule as to statutory liability has been strictly construed by this Court as limited to stockholders of record.

In *Richmond vs. Irons*, 121 U. S., 58, it is said: "By Section 5139 of the Revised Statutes *those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association*, the stock being transferable only in that way. *No person becomes a shareholder subject to such liabilities* and succeeding to such rights, *except by such transfer; until such transfer, the prior holder is the stockholder for all the purposes of the law.*"

The rule is stated as follows by Mr. Justice HARLAN in *Whitney vs. Butler*, 118 U. S., 660:

"If a person permits his name to appear and remain in its outstanding certificates of stock and on

its register as a shareholder, he is estopped as between himself and the creditors of the bank to deny that he is a shareholder. * * * His individual liability continues until there is a *transfer of the stock on the books of the bank*."

It is said in *National Bank vs. Case*, 99 U. S., 628: "One who *appears* on the books of the corporation as the owner of the stock, is liable as a stockholder," for the reason, among others, that "by taking the legal title he has released the former owner."

In *Whitney vs. Butler*, 118 U. S., 655, cited *supra*, the general doctrine is recognized that a transfer on the books is necessary before a purchaser of stock can be charged with liability as a stockholder under the statute. The liability of the former owner, "continues *until there is a transfer of the stock on the books of the bank*, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made."

The Court, however, held that when the certificate had been actually surrendered to the bank, with a power of attorney authorizing a transfer on the books, the former owner would be relieved of liability, although an actual transfer was not made on the books. The Court held that as matter of law it was in effect transferred on the books, just as a deed delivered to the recording officer for record is in effect and as matter of law recorded, although not actually recorded on the books.

That this case did not alter the substance of the rule as to the necessity of a transfer on the books in order to charge a vendee of the stock with liability as a stockholder, is apparent from the subsequent case of *Richmond vs. Irons*, 121 U. S., 58, cited *supra*, reaffirming the proposition that "*no person becomes a shareholder subject to such liabilities * * * except by such transfer.*"

(d) The following cases deal with the liability of pledgees of stock.

In *Pullman vs. Upton*, 96 U. S., 328, it was held that a pledgee, who had caused stock to be transferred to his name on the books of the corporation, appearing as absolute owner, was liable as a shareholder.

The Court cites with approval *R. Co. vs. Moss*, 14 Beav., 64, saying:

"In that case it was said that *only those persons who appear to be shareholders on the register of the company are liable to pay calls.*"

The Court also cites with approval to same effect *Adderly vs. Storm*, 6 Hill, 624. In that case pledgees of stock had received certificates in their own names, the stock having been transferred to them on the books. The debt was paid in September, 1838, and the pledgees returned the certificates to the pledgor, with a power of attorney for the transfer of the stock. The re-transfer was not made, however, till March, 1840. The pledgees were held liable as stockholders of record for a debt contracted in January, 1840, "and this, it was said, would be the law, though the plaintiff may not have known, at the time he trusted the company, that the defendants could be reached."

The Court cites further, to the same effect:

Banks vs. Burnham, 11 Cush., 183.
Wheelock vs. Frost, 77 Ill., 296.
Empire City Bank, 18 N. Y., 200.

In *National Bank vs. Case*, 99 U. S., 628, the same principle is laid down as in *Pullman vs. Upton*, and it was further *held* that after a transfer to the name of the pledgee as owner he remains liable, notwithstanding a subsequent colorable transfer by the pledgee.

On the other hand it was held in *Anderson, Receiver, vs. Philadelphia Warehouse Co.*, 111 U. S., 479, that a pledgee of stock is not chargeable as a shareholder where he is not registered as owner.

It was further *held* that a pledgee who, "in good faith and with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure."

In other words, the cases hold that, if the pledgee appears on the books of the bank as absolute owner, then he is liable as a shareholder by reason of holding himself out as such and on the ground of estoppel. But, where the record itself shows that the party to whom the certificates have been transferred is merely a pledgee, then there is no holding out by the pledgee of himself as absolute owner. There is consequently no estoppel, and the rule laid down in the *Anderson* case applies.

This is the line of reasoning of Mr. Justice HARLAN in the *Pauly* case, on which he bases his conclusion in favor of the defendant (165 U. S., pp. 622–624).

In *National Park Bank vs. Harmon*, 51 U. S. App., 148, affirmed by this Court on the authority of the *Pauly* decision, 172 U. S., 644, it appeared that a pledgee bank had caused the pledged certificates to be transferred from the name of the original pledgor to the name of one of its own employees, who was irresponsible and had no interest in the transaction. This was done after the debt had matured and after the pledgors had defaulted in payment of the debt, and after the right to sell had accrued. The pledgee bank never received any dividends and never voted upon the shares. The Court held that the pledgee bank was not liable as a stockholder of the insolvent bank.

In *Wilson vs. Merchants' Loan and Trust Company*, 98 Fed. Rep., 688, it was *held* by the Circuit Court of Appeals for the Seventh Circuit that a pledgee of

stock with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security without intending to assume liability as a stockholder, cannot be treated as one and subjected to an assessment on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt.

The facts were that the defendant held shares of stock in a national bank as collateral security. The bank was subsequently consolidated with another national bank, and stock of the latter was issued in lieu of stock of the former. Defendant surrendered the shares it held, and caused stock in the consolidated bank to be issued in lieu thereof in the name of an employee, but continued to hold the same as security for the original debt.

The Court cites the decision in *Anderson vs. Warehouse Company* and also the decision in *Pauly vs. Loan and Trust Company* as authority.

So, in *Frater, Receiver, vs. Old National Bank of Providence*, 101 Fed. Rep., 391, the Circuit Court of Appeals for the First Circuit holds that it is only in clear cases that a pledgee on the ground of estoppel can be subjected to liability for an assessment on national bank stock. In that case it appeared that the stock stood upon the books of the bank in the name of a person as cashier of another national bank, and the Court held that the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

(e) The latest decision of this Court on the subject of stockholders' liability, *Matteson vs. Dent*, 176 U. S.,

521, reaffirms the rule that the "legal owner" of stock remains liable so long as the stock stands in his name.

The Court thus states certain exceptions to the rule (per Mr. Justice WHITE, at p. 531):

"1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments such transfer will be disregarded and the real owner will be held liable. *Germania National Bank vs. Case*, 99 U. S., 628, 631, 632; *Bowden vs. Johnson*, 107 U. S., 251, 261.

"2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books and extinguish the liability as stockholder of the transferer (*Whitney vs. Butler*, 118 U. S., 655). In the case just cited in applying the exception the Court very carefully and accurately restated the general rule.

"3. *Where stock was transferred in pledge and the pledgee* for the purpose of protecting his contract *caused the stock to be put in his name* on the books *as pledgee* it has been held that *such a registry did not amount to a transfer* to the pledgee as owner, and that *he therefore was not liable although the pledgor might continue to be so (Pauly vs. State Loan and Trust Co.*, 165 U. S., 606).

"*These and other cases unnecessary to be referred to do not impair, but, on the contrary, serve to prove the general rule.*"

While these exceptions operate to charge a stockholder, who has been a stockholder of record, notwithstanding the transfer to another on the books of the bank, no case in this court has ever held a stockholder liable as such whose name never appeared upon the books. The *Pauly* case certainly does not so hold, nor was it so interpreted by this Court in its subsequent decisions in *National Park Bank vs. Harmon* and *Matteson vs. Dent, supra.*

(f) The "general rule" is stated in Thompson's Commentaries on the Law of Corporations, Sections 3283–4 :

"Every person whose name by his authority has been *placed on the books* of a corporation as a shareholder, is such, both as to the corporation and to its creditors so long as his name remains there. He may hold the shares as Trustee for others or for the Company itself or as collateral security for money loaned ; and yet he is personally liable as a shareholder, and if he suffers loss in consequence of his position, he must seek indemnity from the equitable owner. So although he may have sold his shares to another and received pay for them and delivered to the purchaser his certificate—yet *until the transfer has been perfected by registering the transfer on the corporate books* as required by the charter, statute, articles of association or deed of settlement governing the company, *the transfer*, though valid as between him and the transferee, *does not divest his liability as a shareholder* to the company or to its creditors. The registration being intended in part for the protection of the public, one who has parted with his shares, and yet suffers his name to remain on the register, remains a stockholder by conduct or estoppel."

In *Stufflebeam vs. De Lashmutt*, 83 Fed. Rep., 449, the Court says :

"The liability thus held to exist is, as will be seen, upon the principle of an estoppel by which a person who has held himself out as a stockholder of a corporation will not be allowed to escape the liability that attaches to him in that relation as against persons who dealt with the corporation upon the strength of his relation to it as a shareholder."

The Court, accordingly, *held* that where a person had been induced to purchase stock by fraud, and had been registered as transferee on the books of the bank, but had promptly, on discovery of the fraud, repudiated the sale and the transfer, he was not liable as a

shareholder, it not being shown that any creditor had known of or relied upon the apparent ownership shown by the books of the bank.

See further decision in this case, 101 Fed. Rep., 367.

See, also, *Wallace vs. Bacon*, 86 Fed. Rep., 553.

(g) The cases in the lower Courts cited by counsel for plaintiff in error, do not support his contention.

The case of *Hubbell vs. Houghton*, 86 F. R., 547; affirmed in 91 F. R., 453, was a case where shares in a national bank were bought for defendant by his agent and registered in the name of the agent and were never put in the defendant's name. The agent was an irresponsible person and did not get any benefit of the stock. It was held that the defendant was liable. The purchase was actually completed by entering the stock on the books of the company, which is not the case where no transfer is ever registered.

The legal identity of agent and principal might justify this decision on the ground that the registry in the name of the agent was in law a registry in the name of the principal.

This decision is, however, inconsistent with the decision in *National Park Bank vs. Harmon*, 51 U. S., App. 148; 172 U. S., 644, cited *supra*.

The opinion of Judge PUTNAM in the Circuit Court in this case of *Hubbell vs. Houghton*, 86 Fed. Rep., p. 533, says :

"Here there was no sale between the holders of record and the defendant. They had been his agents, and for all the purposes of this case they were substantially the same as he, and as against the rights of the creditors of the bank the fact that the stock stood in their names on its books and not in his ought to be regarded of the very least importance." "We limit our decision to the precise case presented to us."

The case of *Davis vs. Stevens*, 17 Blatchford, 259, much relied upon by counsel for defendant in error

is similar, except that in that case the person whose estate was held liable had been a stockholder of record. It appeared that on the 29th of October, 1870, one Calvin Stevens, the defendant's testator, appeared on the books of the bank as a shareholder to the amount of 117 shares. On that day he caused these shares to be transferred to one Elston, an irresponsible person and a porter in the office of his New York broker. Subsequently, he made other purchases of the stock of the bank and sometimes made sales. His purchases were put to the credit of Elston on the stock books, and, to meet his sales, he, acting as the agent of Elston under a power of attorney for that purpose, caused the necessary transfers to be made from the same account. On the 22d day of February, 1871, there stood to the credit of Elston on the books 161 shares, for which a formal certificate was issued in his name and delivered to Stevens as his agent. The account on the books remained unchanged from that time until the failure. The Court held the estate of Stevens liable, saying:

"So far as Elston was concerned, the transfer to him was colorable only; and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent, specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens."

These cases are quite distinct from the case at bar, and furnish no authority for holding a vendee of stock liable who has not become a stockholder of record. In such a case as this the doctrine of principal and agent does not apply.

Case vs. Smith, 10 Fed. Rep., 722, was also a case where the party held liable was really the undisclosed principal, while the stockholder of record was only a fictitious shareholder.

The cases of *Snyder vs. Foster*, 73 Fed. Rep., 136, and *Earle vs. Coyle*, 95 Fed. Rep., 99, cited by counsel for plaintiff in error in his brief, are almost identical in their facts. In both cases the cashier of the bank became the purchaser of shares of stock in his own bank. In both cases the purchaser received the certificates from the vendor. In both cases he neglected to have the transfer made. The Court held the vendor released from liability although still a stockholder of record, following *Whitney vs. Butler*, 118 U. S., 655.

The case of *Young vs. McKay*, 50 Fed. Rep., was also a similar case to that of *Whitney vs. Butler*, the stock having been delivered by the broker for the vendor to the cashier of the bank for transfer, who failed to transfer it to the name of the vendee.

(h) An extreme case where this Court exonorated from liability a stockholder of record is *Concord First National Bank vs. Hawkins*, 174 U. S., 364, In this case it appeared that the First National Bank of Concord, N. H., had invested a part of its surplus funds in the stock of the Indianapolis National Bank of Indianapolis. The Court held that this was an act which it had no power or authority in law to do, and, as the investment was an unlawful one, the Concord Bank was not liable as a stockholder of the Indianapolis Bank.

This case, as we have said, is an extreme one in the direction of relieving from liability a transferee who has become a stockholder of record.

The case of *Whitney vs. Butler*, and other cases already cited, illustrate the converse proposition where transferors, although still stockholders of record, are exonerated from responsibility.

The case of *Stewart vs. Hayden*, 169 U. S., 1, illustrates a third condition of affairs, where the Court refused to recognize a transfer as valid because fraudulently made by the transferor, the Court there holding that one who is a holder of national bank stock, the bank being at the time insolvent, cannot escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe that, at the time of the transfer on the books of the bank, it is insolvent or about to fail. This proceeds upon the principle that such a transfer is fraudulent, and, hence, a nullity, and is in line with the previous decisions of *National Bank vs. Case*, 99 U. S., 628, and *Bowden vs. Johnson*, 107 U. S., 251.

It still remains true, however, as we have several times remarked already, that there is no case in this Court holding one liable as a stockholder, who is not or has not been a stockholder of record, and no case in the lower Courts, except where the doctrine of principal and agent applies.

(i) The argument *ab inconvenienti* against departing from the rule limiting liability to those who are stockholders of record is a very grave one. So long as the statutory test is adhered to, and the record is taken as the only and conclusive evidence of liability, except where special circumstances exist as between the transferor and transferee, the Receiver of an insolvent bank has a plain and simple duty to perform. If, however, the real ownership of stock is to be inquired into in every case, parol evidence at once becomes competent

to determine this question, and a Receiver is launched upon a sea of investigation and controversy where disputed questions of fact arise without number, and where issues of veracity between opposing witnesses, requiring the verdict of a jury to settle disputes of fact, would render the winding up of a national bank an affair of complication involving expensive litigation. We submit that the exceptions already recognized by this Court should not be enlarged. The policy of the law is to expedite the winding up of the affairs of insolvent banks and to reduce to the minimum the subject matter of litigation by or against Receivers.

(j) If we have succeeded in establishing to the satisfaction of the Court the proposition thus far discussed and insisted on, namely, that only a registered holder of shares is liable, and that the question of real ownership arises only as between two or more registered holders, there is no need to discuss the other questions raised by the record, since the fact is conceded that the defendant in error never was a stockholder of record in the National Bank of Vernon. If, however, this Court takes the view that one who is not and never has been a stockholder of record, may be made liable under the statute, then we insist that upon the undisputed evidence the defendant was not the "real owner" of the stock, and hence is not liable.

II.

In any view of the law, and even if one not a stockholder of record can be held liable as the real owner, the undisputed facts in this case show that the defendant in error was not in any proper sense the

"real owner" of the stock either in fact or in law.

The history of the dealings with this stock as shown in the statement of facts at the commencement of this brief clearly shows that the bidding in of the stock at the auction sale was purely a formal matter as a preliminary to the commencing of suit upon the note; that there was never any intent on the part of the Southern National Bank to become the absolute owner of the stock, nor to cut off the equity of redemption of the pledgors; that it intended at the time of the auction sale to continue to occupy the position of pledgee merely and not that of absolute owner of the stock; that it so notified one of the makers of the note while the Texas Bank was carrying on business and subsequently so notified its own attorney in Texas; that it took that position upon the trial of the suit in Texas which it brought against the makers of the note; that it tendered the stock in court and deposited the certificates in court in that suit, and that in the final judgment rendered on the decision of the Civil Court of Appeals in Texas it was adjudged by that Court that the makers of the note should pay the full amount of the note with interest, and upon so paying should be entitled to receive the stock as tendered.

The bank, therefore, waived any claim to be the owner of the stock, and declined to accept the benefit or assume the burdens of such ownership.

The stock was never transferred on the books to The Southern National Bank; that bank never voted upon it, nor accepted any dividends on it.

Consequently, the defendant in error is not the "real owner" of the stock within the meaning of the *Pauly* decision, but, on the contrary, is entitled to the benefit of the rule laid down by the *Pauly* decision to the effect that the pledgor is the real owner.

Even if this stock had been transferred on the books to the defendant in error, it would be entitled to be exonerated from liability under the rule laid down in the *Pauly* case.

The facts of this case bring it clearly within the decision in *National Park Bank vs. Harmon*, 51 U. S. App., 148; 172 U. S., 644, more fully discussed *supra*.

In this case as in that, "the defendant never became the |real| owner of the shares, but remained, as it always had been, merely the pledgee thereof."

It appears conclusively by the evidence that defendant not only bid in the property for the benefit of the pledgors, but that it asserted no adverse title on its own behalf, waived any rights which it might have acquired by the nominal purchase, notified the "real owners" that the stock was still held for their benefit and as collateral security for the loan, and that it would be delivered to them upon payment of the loan.

It also appears that the pledgors themselves repudiated the sale of the collateral, and claimed by their pleading in the Texas suit that the sale was wrongful and void as to them, and claimed damages as for a conversion.

It further appears that the stock was tendered to the pledgors in open court in the Texas suit, was deposited in court, where it still remains, and that by the final decree of the Civil Court of Appeals in Texas it has been adjudged to belong to the pledgors and to be deliverable to them upon payment in full of their promissory note.

Under these circumstances, we again repeat, "the defendant never became the [real] owner of the shares, but remained, as it always had been, merely the pledgee thereof," and hence is not liable as a shareholder.

III.

The first assignment of error with regard to the question asked the witness Abrahams is not well taken.

The question was:

"Q. At the time of the sale of that collateral security and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors?"

If we are right in our main contention of law that only a registered shareholder is liable, then any error in the exclusion or admission of testimony becomes wholly immaterial and can have done no harm to the plaintiff in error, since we were entitled to a verdict by direction of the Court upon the conceded fact that the defendant never was a shareholder of record.

If, however, we are wrong on this proposition, then the question of real ownership became the vital question in the case, and any testimony throwing light on the question of whether the ownership was real "or merely nominal" was competent and material. The intention of the defendant in error as to becoming the owner of the stock to the exclusion of the rights of the pledgor was one of the facts throwing light upon this question. The cashier of the bank, who was familiar with the transactions at the time, and who is the officer of the bank who conducted the correspondence put in evidence as further throwing light on the intention of the defendant in error, was the proper party to testify as to the intent with which the nominal purchase of the stock was made in the name of the defendant in error.

"Wherever a witness' intent is relevant, he may be examined as to it."

Wharton on Evidence, § 955.

" Where a party is examined as to his conduct he may be asked as to his motive, his testimony as to such motive being based not on inference but on consciousness."

Wharton on Evidence, § 508.
Ibid., § 482.
Thurston vs. Cornell, 38 N. Y., 281.
Manufacturers' and Traders' Bank vs. Koch, 105 N. Y., 630.

The cases cited by counsel for plaintiff in error on pages 7 and 8 (under Point I.) of his brief are not applicable to the situation in this case.

This was not a purchase from the pledgors, nor was it a purchase by an agent on behalf of an undisclosed principal, as in the case of *McComb vs. Wright*, 4 Johns. Ch., 659 (cited by counsel for plaintiff in error).

It was a nominal sale *by the pledgee* for the mutual account of the pledgors and the pledgee. There being no outside bid, the pledgee nominally bid in the stock for a trifling amount.

Surely, the pledgee was at liberty to waive the nominal title thus acquired and to notify the pledgors, as it did, that it still held the stock merely as collateral. To hold otherwise would be to subordinate the substance of the transaction to the form.

In any event, however, and even if this question were regarded, in any aspect of it, as improper, no harm has resulted therefrom to the plaintiff in error, for the reason that the other undisputed facts of the case showed, as matter of law, that the defendant in error was not in any proper sense the " real " owner of this stock, and hence we were entitled to a verdict by direction of the Court on that question, and, as there was no issue of fact to go to the jury, no harm resulted to the plaintiff in error by the admission of this question and answer, even if incompetent in itself considered.

IV.

There was no disputed question of fact to go to the jury. The evidence was uncontradicted, and the trial Judge was justified in directing a verdict for the defendant on the ground that on the undisputed evidence the defendant was not the "real owner" of the stock.

We have already discussed this subject under Point II. We showed upon the trial the history of the transactions with regard to this stock. The testimony consisted, in the main, of documentary evidence, letters from the defendant's cashier, and the records of the Texas Courts. No exception is taken to the competency or materiality of that testimony. The evidence of the cashier of the defendant bank was also given. No evidence to the contrary was introduced on behalf of the plaintiff. Even if there were any question of the credibility of the oral testimony, there was no sufficient question to go to the jury, as we could afford to disregard the oral evidence and rely entirely on the documentary evidence. The letter of defendant's cashier to the makers of the note and pledgors of the stock on February 15, 1894, is, of itself, sufficient to establish the proposition that the Southern National Bank did not claim ownership, but treated the stock as still held as collateral. At the time when this letter was written, the Vernon National Bank was solvent. It had, it is true, previously suspended business, but, at the date of this letter, it had resumed business and did not go into the hands of a Receiver until the following August. In this letter the cashier of the Southern National Bank says to Mr. Thomas, one of the makers of the note: "All that we wanted, and now want, is the

money owed us by Mr. Curtis and yourself; when that is paid, under the terms of your note, *the collateral will be surrendered by us.*" The certificates of stock were subsequently tendered to the pledgors and deposited in Court in Texas, where they still remain as the property of the pledgors under the judgment as finally declared by the Civil Court of Appeals of Texas in the suit brought by the Southern National Bank against Curtis and Thomas, the makers of the note for which the stock was pledged as collateral. It thus appears that the essential facts with regard to this matter were not only proved without contradiction, but that they were in their nature incapable of contradiction. There was, therefore, nothing to go to the jury, and the Court properly directed a verdict for the defendant in error.

V.

To hold the defendant in error liable, by reason of any theoretical or technical ownership resulting from the nominal sale of the collateral security, would be to subvert the rule laid down by this Court so as to work gross injustice and hardship in the case at bar.

To hold the defendant in error liable as a shareholder because of the nominal sale of the collateral, and thus throw upon the defendant in error, which has already lost $15,000 by the failure of the makers of the note to meet their obligation, the additional loss of $18,000 and interest, is to subvert the rule in the *Pauly* case from one intended to accomplish substantial justice into one which would work gross injustice.

If the *Pauly* decision means anything, it means that the technical ownership of stock shall not be the test of liability, but the real and substantial ownership, and that one who is in fact a pledgee shall not be held liable as if he were the absolute owner, unless he has held himself out to the world as the absolute owner by having the stock transferred to him as owner on the books of the bank.

As Mr. Justice HARLAN says in the *Pauly* case: "And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, 'in addition to the amount *invested in* such shares.' The word 'invested' plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and *cannot refer to those who* never invested money in the shares, but *only received the certificates* of stock, *or it may be the legal title thereto, as collateral security* for debts or obligations already or to be contracted" (165 U. S., 621).

VI.

The judgments of the Courts below were correct, and should be affirmed.

WM. B. HORNBLOWER,
Of Counsel for Defendant in Error.

Supreme Court of the United States.

No. 137.—October Term, 1900.

F. Windsor Robinson, Receiver of the State National Bank of Vernon, Texas, Plaintiff in Error, *vs.* The Southern National Bank of New York. } In error to the United States Circuit Court of Appeals for the Second Circuit.

[February 25, 1901.]

This was an action brought in the Circuit Court of the United States for the Southern District of New York by Robinson, as receiver of the State National Bank of Vernon, Texas, a national banking association, against the Southern National Bank of New York, likewise a national banking association, to recover the amount of an assessment made by the Comptroller of the Currency upon the stock of the State National Bank, of which the defendant bank was alleged to be the owner of one hundred and eighty shares.

The principal facts out of which the controversy arose were as follows:

On January 20, 1893, one W. G. Curtis was the owner of one hundred and eighty shares of the capital stock of the State National Bank, of the par value of $100 each, and which stood in his name on the books of the bank, and for which he held the usual certificates. On that day one A. U. Thomas and the said Curtis borrowed from the Southern National Bank the sum of $15,000, for which they gave their promissory note, payable four months after date. The note recited that the makers of the note had "deposited with said bank as collateral security for the payment of this or any other liability or liabilities of ours to said bank now due or to become due, or that may be hereafter contracted, the following property, viz: One hundred and eighty shares of the capital stock of the State National Bank of Vernon, as evidenced by certificate No. 97, 150 shares; certificate No. 98, 30 shares—the market value of which is now $18,000."

The note contained the usual powers to sell, in case of default in payment, the securities at public or private sale, with the right on the part of the bank to become the purchaser thereof at such sale.

The note was not paid when due, and on August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on the 8th day of August, 1893. On August 7, 1893, it advertised in the New York papers that the stock would be sold at noon of

August 8, at the public exchange in New York. The sale took place at public auction, and the stock was struck off to the defendant for the sum of $20, the defendant being the highest bidder. The defendant then paid the auctioneer the said sum of $20, and afterwards received back from him that sum less his fees. That was the place where and the way in which sales of collateral to such notes were then made in New York.

The certificates of stock at that time remained in possession of the defendant bank, but the stock was not transferred to the defendant bank upon the books of the State National Bank, but continued to stand in the name of Curtis. The defendant bank never voted upon the stock, nor received any dividends thereon.

The State National Bank suspended payment on or before July 21, 1893, and was in possession of the United States bank examiner until September, 1893, when it resumed and continued business as usual, until August 18, 1894, when it finally closed, and the plaintiff Robinson was subsequently appointed receiver.

On August 10, 1893, the Southern National Bank of New York brought an action in the district court of Wilbarger County, Texas, against Curtis and Thomas, in which the complaint recited the fact of the sale of the collateral securities, and that the proceeds of the sale, to wit, twenty dollars, had been applied as a credit on said note, and demanded judgment for the balance of the note remaining unpaid, with interest and costs.

Subsequently, Curtis and Thomas answered, and, among other things, claimed that the Southern National Bank had taken the stock that had been placed with it as collateral by purchasing the same at the sale, that the said stock was worth the sum of $18,000 at the date of said sale, and the same so taken at said sale was in full satisfaction for said note.

They likewise filed a cross petition, in which they alleged that the sale by the Southern National Bank of the collateral stock was made improperly and in fraud of the defendants, and was a conversion of said stock to the use of said bank, which operated not merely to discharge the said note, but to give the defendants Curtis and Thomas a right to be compensated to the extent of the difference between the amount due on the note and the amount of the value of the stock, which they averred to be $18,000.

In an amended petition the Southern National Bank traversed the allegations of the cross petition, denied that they had, in effect or by operation of law, taken said collateral stock in full satisfaction of said note, and alleged that said stock had always been in its possession as collateral, that it had always been ready and willing, and was ready and willing, to return to said Curtis the said stock upon payment of said note, and thereupon tendered to said defendants the said stock upon payment of said note.

Subsequently, and while these proceedings were pending, the defendants Curtis and Thomas proposed to the Southern National Bank that if the bank would credit them with the value of the stock at the rate of sixty cents on the dollar they would confess judgment for the balance, some five thousand dollars. This offer was made on August 7, 1894, and on August 9, 1894, the Southern National Bank, by letter and telegram, stated that this proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed, and thereupon the Southern National Bank declined to stand by the proposal of the defendants to confess a judgment if credited with the stock at the rate of sixty cents on the dollar.

Whereupon the defendants Curtis and Thomas filed a further plea, or statement by way of cross petition, setting up said proposition and acceptance as an accord and satisfaction, and tendering judgment accordingly for amount sued for upon credit of $10,800 being given them, and they prayed that said agreement should be carried out, and for general relief.

The case then came on for trial, and was submitted, on all questions of law, as well as of fact, to the court without the intervention of a jury. The court found that the Southern National Bank was entitled to recover on said note the sum of sixteen thousand two hundred dollars, principal and interest on the note sued on up to August 9, 1894, the time the agreement of compromise was entered into by and between the plaintiff and defendants; that under said agreement said defendants were entitled to a credit of ten thousand eight hundred dollars; and that the plaintiff was entitled to recover from the defendants the sum of five thousand seven hundred and fifty-one dollars, with interest thereon from date, and decreed accordingly.

The plaintiff, the Southern National Bank, was thereupon allowed an appeal to the Court of Civil Appeals of the Second Supreme Judicial District of Texas.

In that court the judgment of the trial court was reversed, and in the opinion the following statement was made:

"Did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief.

"August 7, 1894, one M. J. Tompkins wired appellant: 'Thomas says will confess judgment if you will allow sixty cents for stock;' to which appellant replied by letter and telegram on August 9, 1894, among other things requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement; and, through other counsel, employed about that time, sought to avoid it. When the agreement was made the court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial the court held appellant

to the agreement, and, upon the offer of Curtis and Thomas to comply with its terms, rendered judgment accordingly, deducting $10,800 from the sum due on the note, and giving judgment for the rest.

"It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We then have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it had been in any respect performed or acted on by the debtor. Upon the sole ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount of the debt is denied. We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such a case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and pre-existing status. . . . We therefore adopt the trial court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered."

In the case in the Circuit Court of the United States, the plaintiff having offered in evidence the record of the case in the State courts, also offered in evidence a certificate from the clerk of the district court of Wilbarger County, Texas, in the following terms:

"I, W. B. Townsend, clerk of the district court of Wilbarger County, Texas, do hereby certify that, in the case of the Southern National Bank of New York against W. G. Curtis and W. U. Thomas, No. 688 on the docket of the said district court, the plaintiff, on the trial of said cause, tendered into court and to the said defendants the certificates of stock issued by the State National Bank of Vernon to W. G. Curtis, numbered 97 and 98 respectively, the first being for one hundred and fifty shares of the capital stock of said bank, and the other for thirty shares of the capital stock of said bank, which certificates of stock were filed by the clerk of said court on the 8th day of August, 1895, and have ever since remained on file in said cause in said court, and are on file at this time; that they have never been taken away by said Curtis and Thomas, or either of them, and that Curtis and Thomas, nor any one acting for them or either of them, have not taken said stock away, . . . and that said stock now remains on file in said district court of Wilbarger County, Texas, as appears of record in said cause."

The plaintiff having rested, the defendant put in evidence a certified copy of the decree rendered by the Court of Civil Appeals, containing, among other things, the following:

"It is the order of this court that the appellant, the Southern National Bank of New York, do have and recover of and from the appellees, W. G. Curtis and A. W. Thomas, the sum of fifteen thousand dollars, with six per cent. interest thereon from the 20th day of January, 1893, together with all their costs in this behalf expended. And it further appearing to this court that the said W. G. Curtis and A. W. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the note sued hereon, it is further ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

The defendant bank further put in evidence two letters, dated respectively February 15 and September 27, 1894, written by the cashier of the Southern National Bank to A. W. Thomas and to R. P. Elliot, attorney for Curtis and Thomas, in the following terms:

"FEB. 15TH, 1894.

A. U. THOMAS, Esq.,
210½ *Main Street, Houston, Texas.*

"DEAR SIR: I beg to acknowledge the receipt of your letter of Feb. 8th, and to inform you that a copy of it will be forwarded to our counsel, Mr. H. C. Thompson, with the request that he will make known to us the proposition submitted to him by you. You can rest assured that when this is received it will have our closest attention.

"We never had any disposition to oppress you. All that we wanted and now want is the money owed us by Mr. Curtis and yourself. When that is paid under the terms of your note the collaterals will be surrendered by us. We manifested in every proper way a disposition to help you, and it was only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at seventy-five or eighty cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our board to accept it. The litigation must necessarily be tedious, and loss must certainly come to both of us by reason of counsel fees, costs, &c.

"I shall be glad to hear further from you.

Respectfully yours,
(Signed) J. D. ABRAHAMS, *Cashier.*"

"NEW YORK, *Sept. 27th,* 1894.

R. P. ELLIOT, Esq.,
Attorney at Law, Vernon, Texas.

"DEAR SIR: I have seen our counsel and shown him your letter of the 14th. He agrees that we ought to have a copy of the amended answer setting up an alleged compromise. As soon as that comes I will show it to him and get his opinion then.

"At present I may say in reply to your question 'What do you want with the stock?' that we do not want the stock and never have wanted it. We attempted to sell the stock here after default of payment of the note,

as the terms of the note permitted us to do, but we virtually bid in the stock ourselves and retained possession of it. We informed our former attorney at Vernon, and tried to impress it upon him, that we did not wish the stock and would give the debtors every benefit from it, notwithstanding the attempted sale. If we could have held the stock against the debtors we would not have done so, and we testified to that effect in the depositions now on file in your courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the courts. If the stock turned out to be worth anything we would get the benefit of it to the extent of our claim, and any balance would belong to the debtor.

"The fact is, our counsel here thought the attempted sale did not amount to a sale, for the reason that no officer of the bank was present with the auctioneer and that we simply hold the stock as collateral, as we did before the attempted sale. We were perfectly willing that the matter should so stand in the court at Vernon. Our attorney there seemed desirous of having the stock sent on there to be foreclosed, notwithstanding the attempted sale here. We saw no use in that procedure, for if the sale here was not a sale we had full power, under the terms of the note, to make such a sale here as would be absolutely valid. We got our counsel here to prepare a brief on the subject, a copy of which was sent to our former attorney at Vernon. We have since sent a copy of it to you. You will see by the authorities there cited that we have ability to make a perfect sale of the property here without going to the expense of selling it under foreclosure proceedings in Texas. Moreover, our counsel advises us that he sees no use in making any sale of the stock at all. We are in just as good position in holding the stock as collateral as we would be by holding it by legal title. Upon reflection you will doubtless agree with us and our counsel here. We have not considered that we hold the stock under the alleged compromise, for no compromise was perfected.

"We would like to have you tell us what you think of that defense when you send us the amended answer containing it. We will then get our counsel here to give us his opinion.

"We knew nothing of the fact stated by you that Tompkins stood in with Thomas all the time. Do you think there was a conspiracy between Thomas and Tompkins to effect a compromise with us?

"As to whether the stock will be assessed, will depend upon the action taken by the Comptroller of the Currency. If the bank resumes, perhaps he will permit it to do so by reduction of capital without assessment. Nobody can form any opinion as to the probability of an assessment until it is known what action the Comptroller will take, and whether the directors of the bank will be able to meet his terms.

Very truly yours,

(Signed) J. D. Abrahams, *Cashier.*"

The defendant bank then called as a witness Jesse D. Abrahams, who testified that he was cashier of the Southern National Bank of New York during the years 1893 and 1894; that he was familiar with the transactions connected with the loan to Curtis and Thomas upon the State National Bank of Vernon, Texas; that the stock was put up and sold at auction for

the nominal sum of $20, and bid in by the bank; that it was never transferred on the books of the State National Bank; and, under objection and exception by the plaintiff's counsel, the witness further testified that, at the time of the sale of the collateral security and its nominal purchase by the defendant bank, it was not the intention of the officers of the bank to take title adverseiy to the pledgors, but that the purpose of the sale was to make it the introduction to the suit for the amount due on the note.

The plaintiff then asked the court to direct a verdict for the plaintiff, which the court refused to do, and plaintiff excepted. The plaintiff then asked to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint, which the court refused, and plaintiff excepted. The plaintiff then asked to go to the jury on the issues in the action, which the court refused, and plaintiff excepted.

In obedience to the direction of the court the jury then rendered a verdict for the defendant, and plaintiff excepted.

The case was then taken to the United States Circuit Court of Appeals for the Second Circuit, and the judgment of the Circuit Court was affirmed. (94 Fed. Rep. 964.) A writ of error by the direction of the Comptroller of the Currency was then allowed, and the case brought to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

By section 5139 of the Revised Statutes of the United States it is provided that the capital stock of banking associations shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; that every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and that no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.

By section 5151 it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and by section 5234 the Comptroller of the Currency is authorized to appoint a receiver of an insolvent national bank, who shall, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.

In the present case the State National Bank of Vernon, Texas, having become insolvent, Robinson, the plaintiff in error, was appointed receiver

thereof on September 24, 1894; on February 1, 1895, the Comptroller made an assessment upon the capital stock and the owners of the same equal to the par value of the stock; and on October 26, 1898, the receiver brought an action in the Circuit Court of the United States for the Southern District of New York against the Southern National Bank of New York as an alleged shareholder liable to pay its proportionate share of such assessment.

The reported decisions show that there are two classes of cases of this character—one, wherein the liability has been enforced against a party defendant in whose name the stock was registered on the books of the bank, regardless of the question whether he was, in point of fact, the owner of said stock; and the other, where the liability has been enforced against the real owner of the stock, although the stock stood registered on the books in the name of a third person.

In the former class, the liability is said to be created by the act of the party, in whose name the stock is registered, in holding himself out as a stockholder, and thus inviting others to deal with the bank and become creditors, relying on the reputation and financial strength of the nominal stockholders

Cases are also to be found in the books where transfers, made by shareholders in anticipation of a bank's insolvency, to irresponsible persons, have been held to be a fraud on the statute, and inefficacious to relieve the original holder from liability. (*Bowden* v. *Johnson*, 107 U. S. 251; *Richmond* v. *Irons*, 121 U. S. 27; *Pauly* v. *State Loan Co.*, 165 U. S. 619; *Matteson* v. *Dent*, 176 U. S. 521.)

The conceded facts in the case are that the one hundred and eighty shares of the stock embraced in the assessment were the property of W. G. Curtis, in whose name they were registered on the books of the bank, and who held the certificates therefor; that the certificates were deposited with the defendant bank as collateral; but that the stock remained in the name of Curtis, and so continued to be at the time of the bringing of this suit. It, therefore, follows that the case is not one in which the defendant bank is estopped by having assumed an apparent ownership of the stock.

The important inquiry is whether, by the mere act of bidding in the stock at a nominal price, the Southern National Bank of New York must be regarded as having subjected itself to liability as the real owner thereof.

The facts to be considered in connection with this question are as follows:

On January 20, 1893, Curtis and Thomas borrowed from the Southern National Bank of New York the sum of $15,000, giving therefor their joint note for that amount, payable four months after date, and as collat-

eral security, two certificates for one hundred and eighty shares of the capital stock of the State National Bank of Vernon, standing in the name of Curtis. The note was not paid at maturity. On July 21, 1893, the State National Bank suspended, and was in possession of the United States bank examiner from that date until September 14, 1893, when it reopened for business and continued to transact business as usual until August 18, 1894, when it finally suspended. The fact of such suspension and that the bank examiner was in charge was known to the Southern National Bank on July 26, 1893.

On August 1, 1893, the defendant bank notified Curtis and Thomas by telegraph that the stock would be sold on August 8, 1893, and it was so sold. On August 10, 1893, the Southern National Bank brought suit against Curtis and Thomas in the district court of Wilbarger County, Texas. Curtis and Thomas filed pleas, and also a cross petition, averring that the sale by defendant bank of the stock pledged was not made in pursuance of the powers granted in the written pledge and was a fraud of the rights of the defendants; that by reason of said fraudulent sale the defendants had suffered damage to the amount of fifteen thousand dollars, which they asked to be set off against the note sued on, and also that it should be adjudged that they had a right to recover the difference between the amount of the note and the value of the pledged stock, &c.

Supsequently Curtis and Thomas filed an additional plea or statement by way of cross petition, in which they allege that since the filing of their first cross petition the Southern National Bank had agreed to credit them with the amount of $10,800 for the stock at the rate of sixty cents on the dollar, and that, in consideration thereof, they, Curtis and Thomas, had agreed to confess judgment for the balance due on the note, which they averred they were willing and ready to do.

In and by amended petitions the Southern National Bank claimed that the said bank stock had been, at all times since the execution and delivery of the note sued on, in the possession and under its control, and that it had always been ready and willing to return said bank stock upon payment of said note, and tendered in open court said bank stock upon payment of said note. At the trial in the district court of Wilbarger County that court held that the alleged agreement by the Southern National Bank to credit the defendants with the stock at the rate of sixty cents on the dollar was binding, and entered judgment accordingly in favor of the Southern National Bank in the sum of $5,751.00. On appeal by the Southern National Bank to the Court of Civil Appeals of Texas, the judgment of the District Court was reversed, and judgment was entered in favor of the bank for the full amount claimed, and decreeing the bank stock to Curtis and Thomas as tendered. A portion of said decree was in the following terms:

"And it further appearing to the court that the said W. G. Curtis and A. W. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the notes sued hereon, it is therefore ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment, as per the tender of the appellant, and that in default of such payment said stock be sold as under execution, and the proceeds applied to the payment of this judgment."

It further appears that said certificates of stock remain on file in the said district court of Wilbarger County, not having been taken away by said Curtis and Thomas.

It has therefore been finally adjudicated between the Southern National Bank and Curtis and Thomas that there had been no conversion of the stock as alleged, and that the Southern National Bank, having waived its right as purchaser thereof, the stock has been decreed to be the property of Curtis and Thomas, subject to the payment by them of the judgment in favor of the bank. As between those parties, then, it cannot be pretended that the Southern Bank is under any legal or equitable obligation to Curtis and Thomas to assume or answer for the assessment made by the Comptroller on the stock. Having denied the validity of the auction sale, and forced an issue on that question, they cannot now, after a decision in their favor as respects the ownership of the stock, be heard to allege that the stock is really owned by the Southern National Bank, and that Curtis has been released from his liability as a shareholder.

If this be so, what foundation is there on which to base a recovery against the Southern National Bank in favor of the receiver of the State National Bank?

It is admitted that Curtis has always been and is liable as the registered owner of the stock; that, at no time, nor in any way, has the Southern National Bank held itself out to the State National Bank, or to its creditors, as a shareholder therein; and it is admitted that the Southern National Bank never received dividends and never voted on said stock.

It was held in *Pauly* v. *State Loan & Trust Company*, (165 U. S. 606,) that where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name on the books as pledgee, such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. When, therefore, it was decided, in the suit on the note, that the bank did not, by bidding in the stock at the auction sale for a nominal price, cease to be the pledgee, and that the stock remained the property of Curtis, how can it be said that the receiver, as respects that question, is in any better position? It may be said, indeed, that he was not a party to that suit, and is therefore not bound by the judgment; and it may be conceded that there might be cases where, by reason of fraud

or collusion between the nominal shareholder and the real owner, the receiver would not be precluded, but might maintain his suit independently.

But, plainly, this is no such case. Indeed, the record of the Texas suit was put in evidence by the receiver, the plaintiff in error, and there is no effort to impeach the good faith of the bank in bringing that suit or in tendering the stock, nor can any objection be made to the soundness of the conclusions reached by the Court of Civil Appeals.

This court has held in *California Bank* v. *Kennedy*, (167 U. S. 362,) and *Concord National Bank* v. *Hawkins*, (174 U. S. 364,) that it is not competent for national banking association to invest any portion of their capital permanently in the stock of another corporation, and that they are not estopped from setting up such want of power against suits to enforce liability for assessments made by the Comptroller of the Currency. While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced, (a proposition which we withhold from decision,) we think there is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares. This was the view taken in the case of *Frater, Receiver*, v. *Old Nat. Bank of Providence*, (86 Fed. Rep. 1006, and 103 Fed. Rep. 391,) where it was held, after full consideration, that it is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests; and that where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.

Exception was taken in the Circuit Court to a question allowed to be put to the cashier of the defendant bank, whether at the time of the sale of the collateral security, and at the time of the nominal purchase for $20, it was the intention of the officers of the bank to take title adversely to the pledgors?

Whether it was competent to get at the intention of the bank officers in bidding in this stock at a nominal price, by examining one of such officers, might not be clear, if this were a contest between pledgor and pledgee. But that question was, as between them, closed by the record in the Texas suit.

In the present case the question was an immaterial one, particularly as the case was not submitted to the jury, and as the other undisputed facts

of the case showed that, as matter of law, the Southern National Bank was not, in any proper sense, the real owner of the stock. We agree with the courts below in thinking that the pledgee was at liberty to waive the nominal title thus acquired and to notify the pledgors, as it did, that it still held the stock merely as collateral. We think that it is clear that the transaction, as it is admitted to have occurred, did not deceive or injure the insolvent bank or its creditors.

The judgment of the Circuit Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.